

(30,162)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 852

THE BALTIMORE & OHIO RAILROAD COMPANY,
APPELLANT,

vs.

THE CITY OF PARKERSBURG

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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[fol. a] UNITED STATES OF AMERICA, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit begun and held at the court-house, in the city of Richmond, Virginia, on the first Tuesday in November, being the sixth day of the same month, in the year of our Lord one thousand nine hundred and twenty-three.

Present: Hon. Charles A. Woods, Circuit Judge; Hon. Edmund Waddill, Jr., Circuit Judge; Hon. D. Lawrence Groner, District Judge.

Among other were the following proceedings, to-wit:

THE CITY OF PARKERSBURG, a Municipal Corporation, Appellant,
versus

THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation,
Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg

Be it remembered that heretofore, to-wit, on February 28, 1923, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

[fol. 1]

Transcript of Record

Be it Remembered, that heretofore, to-wit: On the 10th day of April, 1894, came the Baltimore & Ohio Railroad Company, by counsel, and filed in the Clerk's office of the Circuit Court of the United States for the District of West Virginia, their bill of complaint against The City of Parkersburg, West Virginia, and others, which said bill of complaint is in the words and figures following, to-wit:

BILL OF COMPLAINT—Filed April 10th, 1894

To the Honorable Judges of the Circuit Court of the United States for the District of West Virginia:

The bill of complaint of the Baltimore and Ohio Railroad Company, which is a corporation created and existing under and by virtue of the laws of the State of Maryland, and having its principal office and place of business in said State, and as such, is a citizen of said State of Maryland, filed in the said Circuit Court Against The City of Parkersburg and John W. Dudley, the Sheriff of Wood

County, the said City of Parkersburg, being a body corporate created by and existing under the laws of the State of West Virginia, and the said John W. Dudley, sheriff of Wood County, aforesaid, being a citizen of the State of West Virginia:

And thereupon your orator complains and says, that on the 14th day of February, 1851, the General Assembly of Virginia passed an Act to incorporate the North Western Virginia Railroad Company, which is referred to as found printed in the Session Acts of the General Assembly of Virginia of 1851-1852.

That by said act and charter the said company was authorized to construct a railroad from Parkersburg in the county of Wood, to intersect the line of the Baltimore and Ohio Railroad at some eligible and convenient point at or near the mouth of Three Fork in the County of Taylor.

[fol. 2] That said North Western Virginia Railroad afterwards was duly organized and obtained its necessary rights of way, and with the money and aid furnished by the Baltimore and Ohio Railroad Company, constructed its railroad between Parkersburg in the County of Wood to the terminus in Taylor County, now called Grafton.

That in order to raise the necessary funds to construct said road, the said North Western Virginia Railroad Company, under the authority given it by its charter on the 21st day of March, 1852, executed a deed of trust or mortgage to the Mayor and City of Baltimore, on all its then present and future property, in order to secure certain bonds therein, amounting to the sum of \$1,500,000 which were guaranteed by the said Mayor and City Council of the City of Baltimore, and also on the same day, to-wit: on the 21st day of March, 1853, the said North Western Virginia Railroad Company executed to the Baltimore and Ohio Railroad Company, and subject to the first mortgage, a second mortgage to secure \$1,000,000 in the bonds of the North Western Virginia Railroad Company, which were guaranteed by the Baltimore and Ohio Railroad Company, copies of which mortgage will be filed herewith if required, marked exhibits "A & B."

That by said mortgage, all the property, road-bed, works and lots in the City of Parkersburg and other property then or thereafter acquired, were included and conveyed.

That on the 13th day of March, 1854, John J. Jackson and others by deed conveyed to the North Western Virginia Railroad, certain real estate, along and upon the banks and lines of the Ohio and Little Kanawha Rivers, in the said Town of Parkersburg, with certain wharf rights and privileges, in consideration of a large sum of money named in said deed, which lands, rights and privileges were and are of great value. A copy of said deed duly certified is filed herewith, marked exhibit "C" as part of this bill.

That no other railroad than the North Western Virginia Railroad was then in contemplation and under construction from the line of the Baltimore & Ohio, Westward by way of the vicinity of Parkersburg, at the time the said town made the deed and entered into the

contract hereinafter next mentioned, dated June 8th, 1855, and it was not fully determined whether the said North Western Virginia Railroad would terminate at Parkersburg, or, by a branch line, would go further down the Ohio River, and if the latter should be done, it would materially affect the interests adversely of the said town of Parkersburg. And therefore the citizens and authorities of said town, in order to induce the North Western Virginia Railroad Company to make said town its actual terminus, and to carry out the intent of the statutes in such case made and provided, in aid of such intended improvement, on the 8th day of June, 1855, the President, Recorder and Trustees of the Town of Parkersburg, entered into a contract in writing with the North Western Virginia Railroad Company, according to the terms and conditions set forth in the record and proceedings of the meeting of the council of said town, held on the 8th day of June, 1855, a copy of which record is filed herewith marked exhibit "D" as part of this bill.

That the said contract was made at the same time that the deed next hereinafter referred to was executed, and by said contract, the North Western Virginia Railroad Company, agreed to construct a graded wharf to be completed by the time its road should be opened to the public, extending from the upper line of Ann Street around the Point to the upper line of Kanawha street, extended to the Ohio River and within three years thereafter to construct a wharf with suitable grade at the foot of Court Street, the same to be sixty feet wide, or as much thereof as might be necessary to be for the use of the Ohio Ferry &c., as shown by the third section of said agreement, exhibit "D".

On the 8th day of June, 1855, the President and Recorder and Trustees of the Town of Parkersburg, by Henry Logan, its President, acting for and on behalf of said Recorder, Trustees and Town of Parkersburg, and the North Western Virginia Railroad Company by Thomas Swann, its then President, under the seal of the said Town and under the seal of the said company, executed a deed whereby, amongst other things, the said town of Parkersburg, party of the first part, granted certain franchises, rights and privileges to the said North Western Virginia Railroad Company and to its successors, and amongst these franchises, rights and privileges, the said party of the first part, meaning the Town of Parkersburg, for and in consideration [fol. 4] of the covenants and stipulations therein set forth, and in consideration of the real estate and rights conveyed to said town by the North Western Virginia Railroad Company, did further grant and covenant to and with the parties of the second part, meaning the North Western Virginia Railroad Company, that all the property owned, used or occupied by the parties of the second part, meaning the North Western Virginia Railroad Company, and its successors within the jurisdiction of the parties of the first, meaning the Town of Parkersburg, so long as the same should be owned, used or appropriated by them to purposes connected with the business of their railroad, should be free from all town taxes, assessments and charges, and that all the privileges thereby granted and assured by the parties of the first part to the parties of the second part, should

apply as fully to property and rights thereafter acquired, used or occupied by them within the said town and jurisdiction as to those they then owned, used or occupied or may thereafter acquire, use or occupy &c., and in consideration of the foregoing grants, covenants, and agreements and stipulations of the parties of the first part, including of course the exemption from town taxes, assessments and charges, the said North Western Virginia Railroad Company, the party of the second part did thereby grant and convey to the party of the first part, the Town of Parkersburg, and their successors, all the right, title and interest and estate granted and conveyed to them, the parties of the second part, by the said deed from John J. Jackson and others of record in Wood County, and to the use and residue not therein mentioned, all the lands, banks and shores described in the said deed, with the water rights and appurtenances thereunto belonging, to be used exclusively for wharves, landings and other purposes connected with the use of the Ohio and Little Kanawha Rivers &c., of all which will be more fully seen by reference to a copy of said deed of June 8th, 1855, duly acknowledged and recorded and made part of this bill, marked exhibit "E".

Your orator further shows that at the regular meeting of the council of the said town of Parkersburg, held on the 13th day of July, 1855, the President of the Council of the Town, reported to the Council that the said deed of June 8th, 1855, had been made and executed by the President on the part of the council, and by Thomas Swann, President of the said North Western Virginia Railroad Company, on the part of the said company, each conveying to the other their interests in certain portion of the river, banks and other rights and privileges as set out in the resolutions adopted at a special meeting held June 8th, 1855, which deed is now of record in the clerk's office of the County Court of Wood County, a copy of the minutes of said meeting in July 13th, 1855, is filed herewith marked exhibit "F" as part of this bill.

Your orator further shows that at the time of the execution of said deed, the said North Western Virginia Railroad Company had acquired certain town lots in the Town of Parkersburg, which it had appropriated to the business of its road, and that since the date of said deed, it acquired other lots and property in said Town for the purpose of its use, and which were appropriated, and have been used in connection with the business of said road, and which, by the terms of said deed and contract were to be free of town taxes and assessments.

Your orator further shows that the President, Recorder and Trustees of the Town of Parkersburg, at the date of the said deed of June 8th, 1855, and contract, had full power and authority to make said deed and the covenants therein, in consideration of the terms and conditions and privileges therein stated, whereby the said North Western Virginia Railroad Company's lots and property in the Town of Parkersburg should be exempt from all town taxes and assessments, and that from that time to the present, the parties have acted upon and ratified and adhered to said covenants and stipulations in said deed contained.

And your orator further shows and alleges that under the conditions and stipulations set forth in the two several mortgages hereinbefore referred to dated March 21st, 1853, such proceedings were had under under said mortgages, that afterwards, to-wit: on the — day of February, 1865, the said mortgages were foreclosed by a sale of all lands and property, rights and interest of the North Western Virginia Railroad Company in said town and along the line of said railroad and the franchises of said railroad company, and that at said sale, your orator being the principal stockholder in said North Western Virginia Railroad Company, became the purchaser thereof, and that [fol. 6] under the laws of West Virginia (Code 1860, Chapter 61) then in force, had the right and did by and under the deed which was executed to it, declare that it would become a corporation, as to said property, by the name of the Parkersburg Branch Railroad Company, according to the statutes in said cases made and provided, and that said sale was made under the first mortgage, and the deed of conveyance was therein passed to the purchaser, your orator, not only of the works and property of the company, as they were at the time of the making of the deeds of trust or mortgages aforesaid, but also all the other property of which the North Western Virginia Railroad Company was seized or possessed at the time of the sale, and that amongst other rights, properties and interest belonging to the North Western Virginia Railroad Company, which by said deed of conveyance under said foreclosure, proceedings were transferred and passed by the said conveyance to your orator and which thereby became the property of your orator for the purpose of its said branch railroad, were all the lands and lots, tracts or parcels of land situated in the Town of Parkersburg.

Your orator further shows that the said City of Parkersburg was incorporated in the year 1860 as the successor of the Town of Parkersburg and from time to time its jurisdiction has been extended by the Legislature of the State of West Virginia, and that on the 30th day of May, 1865, the Mayor and Council of the City of Parkersburg, passed an ordinance authorizing the extension of the Parkersburg Branch Railroad through the City to the Ohio River, and the third section thereof of said ordinance declares the said deed of the 8th day of June, 1855, and all ordinances and parts of ordinances passed by the said Town and accepted by the North Western Virginia Railroad Company, to be in full force and binding on the City of Parkersburg, and the Parkersburg Branch Railroad Company as the successors of the former parties to said deed and said ordinances. A copy of the said third section of said ordinance is filed herewith marked exhibit "G" as part of this bill.

And your orator further shows that on the 28th day of February, 1865, the Legislature of West Virginia passed an act to empower certain railroad companies to purchase and hold real estate in the [fol. 7] City of Parkersburg in Wood County, which act is referred to and made part of this bill. Chap. 73 of the Acts of 1865.

And your orator further shows that afterwards to-wit: on the 10th of May, 1867, the Mayor and Council of the City of Parkersburg passed an ordinance entitled an ordinance to widen Washington

street &c., and that in the third section thereof, the said contract and deed of June 8th, 1855, and all ordinances and parts of ordinances were declared to be in full force and binding on the City of Parkersburg and the successors of the North Western Virginia Railroad Company, and that by the fourth section, certain permission and privileges granted by the ordinance of May 10th, 1867, were declared to be upon the terms and conditions therein mentioned, that is to say, that the Parkersburg Branch Railroad Company, which was the representative as well as the creature of the Baltimore and Ohio Railroad Company, under its purchase of the property of the North Western Virginia Railroad Company aforesaid, should, without unnecessary delay, proceed to the construction of the wharf at the foot of Court Street on the Ohio River in said City as provided in the said deed and conveyance and agreement, and complete the same at the costs and charges of the said Company, on or before the first day of December, 1868, &c. A copy of said ordinance of May 10th, 1867, is filed herewith marked exhibit H as part of this bill.

And your orator further shows and charges that afterwards, to-wit: on the 15th day of March, 1870, the Mayor and Council of the city of Parkersburg, passed another ordinance entitled an ordinance to amend and re-enact the ordinance passed May 10th, 1867, &c., and that by the first section thereof, it was provided that if the Parkersburg Branch Railroad Company, should, within thirty days from and after the passage of this ordinance, pay to the City of Parkersburg, the sum of \$7,500, the said sum should be received as a performance and discharge of the terms and conditions of the fourth section of the ordinance passed May 10th, 1867, &c. A copy of said ordinance is filed herewith as a part of this bill, and marked exhibit "I".

And your orator alleges that for and on behalf of the Parkersburg Branch Railroad Company, it advanced and paid to the City of [fol. 8] Parkersburg, the said sum of \$7,500, which the said City accepted and received as full performance and discharge of so much of said contract of June 8th, 1855, section three hereinbefore referred to, as related to the building of the wharf at the foot of Court street on the Ohio River in said City.

And your orator further shows and charges that by virtue of the said deed of June 8th 1855, and of the said contract of the same date, and according to the terms, covenants and stipulations therein contained, the property of the North Western Virginia Railroad Company in the Town of Parkersburg, was made free of all taxes and assessments or other charges, and that this exemption was in effect a commutation of all taxes and assessments and other charges which the said Town or the said City might thereafter levy or make upon the property aforesaid in consideration of the transfer of the property conveyed to the said Town of Parkersburg, and to which the City of Parkersburg has succeeded as set forth in the said deed of June 8th, 1855.

And your orator further shows that by virtue of its purchase of the property of the North Western Virginia Railroad Company, it

succeeded to the right and title in and to all the property and rights of the said North Western Virginia Railroad Company, and that under the laws of the State of West Virginia at the time your orator purchased said property under the said foreclosure proceedings, it had a right to give a name to the franchise and estate of the corporation whose property was sold as aforesaid, and that it is entitled to the benefit of the commutation and exemption provided for by said deed and agreement so made by the said Town of Parkersburg with the North Western Virginia Railroad Company aforesaid, against all taxes and assessments or charges in the said Town or City of Parkersburg, and that the City of Parkersburg, by the ordinances herein referred to, and by the acceptance of the sum of \$7,500 aforesaid, has ratified and fully confirmed, if any such confirmation or ratification were necessary, the said contract of commutation and exemption from taxation, and that your orator had hoped that the said City of Parkersburg would refrain from making any claim or from interfering with your orator in its rights in the premises, growing out of said commutation and exemption from taxation as aforesaid, which commutation and exemption have always [fol. 9] hitherto been ratified and confirmed by the said Town or City of Parkersburg.

But now so it is may it please your Honors, the City of Parkersburg now claims that there is due on the property exempted and commuted from taxation aforesaid, the sum of \$1,042.73 as taxes for the year 1893, and it has given out notice that it intends to collect or cause to be collected the said taxes and assessments for the year 1893, and that the Mayor of the City has notified the Auditor of the State of West Virginia to proceed under the laws of the State to compel the Sheriff of Wood County aforesaid, John W. Dudley, to collect the said taxes and assessments on the property aforesaid, and that your orator is advised that the said Dudley is about to proceed to levy upon the property of your orator in the said city, for the purpose of collecting the taxes and assessments aforesaid, which were commuted and exempted by virtue of said deed and contract of 1855, and that the said Sheriff has actually levied the said taxes on the following property of your orator, Locomotive Engine Nos. 501 and 748 of great value to-wit: of the value of \$20,000 and that unless restrained and inhibited by the process of this Honorable Court, the said Sheriff will seize and take into his possession the said locomotives, rolling stock and property of your orator, the same to satisfy the said illegal taxes.

Your orator further says that it has paid all the taxes and assessments due from it in the County of Wood and the City of Parkersburg, to which the said county or city are entitled according to law, and that it is advised that it is not bound to pay the said sum of \$1,042.73 taxes illegally imposed upon its property in the said City, nor the said ten per centum thereon. Your orator files herewith a statement of the taxes as shown by the books of the Auditor of the State of West Virginia for the year 1893, charged against it in the County of Wood and the City of Parkersburg, showing under the column of municipal taxes, the said sum of \$1,042.73, which is

the total thereof at the rate of \$1.10 per thousand upon the valuation of \$94,793.79, which account is marked exhibit "K" as part of this bill. Your orator files herewith a statement "L" showing the real estate and property so assessed with city taxes and which is exempt as aforesaid:

Your orator further charges that the City of Parkersburg by the [fol. 10] express terms and stipulations of the said deed and contract of June 8th, 1855, can not, with impunity, violate its covenants and agreement with your orator as the successor in title and right of the North Western Virginia Railroad Company, and it is in bad faith, unjust, inequitable and fraudulent on the part of the said City, after having for more than thirty years, had the benefit and advantage of the property conveyed to it by the North Western Virginia Railroad Company, and after having for more than twenty years had the sum of \$7,500 paid into its treasury by your orator, in consideration of said release, commutation and exemption from taxation by said city, to ignore, violate and repudiate said deed and contract and its obligations under the same.

Your orator charges that it is entitled to the interposition of a court of equity against the said acts and conduct of said city in seeking to ignore and break said contract and agreement.

That it is a fraud upon your orator, after said city has had the undisputed use of your orator's property and money as aforesaid, transferred and paid in consideration of said commutation of municipal taxes, assessments and charges, for the city to collect or to seek to have collected, such taxes and yet retain said property and the rents, issues and profits thereof, and the said sum of \$7,500 with interest thereon for nearly twenty-four years, amounting to almost \$17,000.

Your orator further shows that said taxes so claimed, constitute a lien upon the property of your orator, and a cloud upon its real estate in said city, which is of great value, to-wit, of the value of \$70,000 at the least.

That the seizure and sale of your orator's property by the said Sheriff in order to collect said illegal taxes will operate as an irreparable injury to your orator; there being no plain or adequate or complete remedy at law under any statute or proceeding in the State of West Virginia, whereby your orator could recover the amount of said taxes if paid to said sheriff for said city, and no redress by the strict rules of the common law is afforded your orator in the premises.

In tender consideration whereof your orator prays that the City of Parkersburg, and John W. Dudley, Sheriff of Wood County, may [fol. 11] be made parties defendant to this bill, that they may be compelled to answer the same; that the said City and its officers and agents and the said John W. Dudley, sheriff as aforesaid, his deputies, agents, attorneys and all persons acting under him may be perpetually restrained and enjoined from levying and collecting said taxes and the interest claimed thereon by levy upon and sale of the property of your orator or by any other means or proceeding, and that your orator may have such other further and general relief in

the premises as to equity may seem meet, and as in duty bound it will ever pray, &c.

The Baltimore & Ohio R. R. Co., by Counsel. Jno. A. Hutchinson, Counsel for Plff.

STATE OF WEST VIRGINIA,
County of Wood, To wit:

John Adair, being duly sworn, says, that he is the agent for the Baltimore & Ohio Railroad Company, plaintiff, named in the foregoing bill, and that he knows the contents thereof; that the facts and allegations therein contained are true, except as are therein stated upon information and belief, and that as to such allegations he believes them to be true.

John Adair, Agt.

Taken, sworn to and subscribed before me this 9th day of April, 1894. L. B. Dellicker, Clerk C. C. U. S., D. W. Va.

EXHIBIT A FILED WITH BILL OF COMPLAINT—Filed April 10, 1894

This indenture made this 21st day of March, in the year of our Lord, eighteen hundred and fifty-three, between the North Western Virginia Railroad Company, a corporation, created by an Act of the General Assembly of the State of Virginia, passed on the 14th day of February, in the year eighteen hundred and fifty-one, of the first part, and the Mayor and City of Baltimore of the second part, [fol. 12] Witnesseth, whereas, the Mayor and City Council of Baltimore did by an ordinance approved on the 5th day of June, in the year 1852, made it a prerequisite to the delivery to the said company of certain bonds of said Company after the same had been guaranteed by the said Mayor and City Council, as provided for in said ordinance, that the said Company should execute to the Mayor and the City Council aforesaid, a good and sufficient deed pledging the property of the said Company, for the payment of said bonds, or certificates of loans and the interest thereon according to their tenor; it which deed there should be a proviso that the Mayor and City Council of Baltimore having first obtained authority from the Legislature of Maryland so to do, might at any time during the construction, or within five years after the completion of said North Western Virginia Railroad, elect to have stock at par in the said North Western Virginia Railroad Company to the amount of the bonds or certificates of loan, so guaranteed, or any part thereof, the said Mayor and City Council in that event releasing the said North Western Virginia Railroad Company from all liability and guaranteeing said company from all loss on account of the said bonds or such amount thereof as corresponds to the amount of stock so elected to be taken, assuring the payment of the same in the hands of the third parties, without recourse thereafter, for principal or interest to the said North Western Virginia Railroad Company.

And whereas, the said parties of the first part have issued the bonds referred to, bearing even date herewith for the sum of one million and a half of dollars, and in sums of one thousand dollars and five hundred dollars in the following words and figures:

One.
\$1,000.

No. —.

United States of America, State of Virginia

North Western Virginia Railroad Company

Parkersburg, January 1st, 1853.

This is to certify that the North Western Virginia Railroad Com-[fol.13] pany, a corporation, created by an Act of the General Assembly of the State of Virginia, passed on the fourteenth day of February, 1851, are indebted to Columbus O'Donnell, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, payable on the first day of January, in the year one thousand and eight hundred and seventy-three, in the City of Baltimore, on the surrender of this certificate of loan, with interest thereon in the interval, at the rate of 6% per annum, payable semi-annually, in the City of Baltimore on the first days of July and January in each and every year on the presentation of the respective half yearly coupons hereto attached, which payment of principal and interest is secured by the guarantee of the Mayor and the City Council of Baltimore hereon endorsed. And by virtue of and in conformity with the Act of the General Assembly of Virginia, passed as aforesaid, the property of the said Company is hereby pledged for the payment of the principal of this certificate and the interest that may accrue thereon, according to the terms of a mortgage from the said North Western Virginia Railroad Company to the said Mayor and City Council of Baltimore, bearing even date herewith.

In witness whereof, the President of the North Western Virginia Railroad Company has set his hand and caused the seal of said Company to be affixed hereto, on the first day of January, in the year one thousand eight hundred and fifty-three.

Thomas Swan. Countersigned: P. G. Van Winkle, Secty.
(L. S.)

On which there is endorsed the following guarantee by the said Mayor and City Council, for value received, the Mayor and City Council of Baltimore do hereby guarantee the payment of the within certificate of loan with the interest thereon, according to its tenor under the authority of an Act of the General Assembly of Maryland, passed at January session, 1852, entitled "An Act giving certain powers to the Mayor and City Council of Baltimore in regard to the North Western Virginia Railroad Company and in pursuance to an ordinance of the said Mayor and the City Council passed on the 5th day [fol. 14] of June in the year 1852, entitled "An ordinance to guaran-

tee the bonds of the North Western Virginia Railroad Company."

In testimony whereof, John Smith Hollins, Mayor of the said City hath hereunto subscribed his name and caused the corporate seal of the said Mayor and City Council to be hereto affixed on this — day of — in the year one thousand eight hundred and fifty-three.

— — —, Mayor. Countersigned: — — —, Register.

And whereas, it is the purpose of the said parties of the first part to give hereby the pledge required by the ordinance aforesaid. Now this indenture witnesseth, that the said parties of the first part for and in consideration of the premises and of the sum of \$5 to them paid by the said parties of the second part, at and before the sealing and delivering of these presents, a receipt whereof is hereby acknowledged, and in pursuance of the authority given by the fourth section of the Act of Assembly of Virginia, aforesaid, have granted, and by these presents, do grant unto the Mayor and City Council of Baltimore all the property of the North Western Virginia Railroad Company, of every kind, nature and description, the same may be, as well that which they may at this time actually hold as that which in the prosecution, completion, stocking and working of the said railroad shall be accumulated thereon.

In trust to secure the payment of the said bonds or certificates of loan with the interest thereon, according to their tenor to the end that the said Mayor and City Council of Baltimore may be saved harmless and indemnified from all loss or injury consequent in any manner upon the guarantee hereinbefore mentioned.

And the said North Western Virginia Railroad Company hereby obligate themselves to keep the said road in good order and well stocked, and the said North Western Virginia Railroad Company doth hereby stipulate, agree and provide that the said Mayor and City Council of Baltimore, having first obtained authority from the [fol. 15] Legislature of Maryland so to do, may at any time during the construction or at any time within five years after the completion of said road, elect to take stock at par, in the North Western Virginia Railroad Company to the amount of the bonds or certificates of loan, so guaranteed or any part thereof, provided the said Mayor and City Council shall in that event release the said North Western Virginia Railroad Company from all liability and guarantee said Company from all loss on account of the said bonds or such amount thereof as corresponds to the amount of stock so elected to be taken and assume the payment of the same in the hands of third party, without recourse thereafter for principal or interest, to the said North Western Virginia Railroad Company. And the said North Western Virginia Railroad Company have directed Thomas Swan, their president, to acknowledge this indenture, that the same may be duly recorded according to law.

In testimony whereof, the said North Western Virginia Railroad Company have caused these presents to be sealed with their seal and

to be signed by their president, on the day and year first above written.

Thomas Swan, President N. W. Va. R. R. Co.

Signed, sealed and delivered in the presence of ———.

STATE OF MARYLAND,

Baltimore City, set:

Be it remembered, and it is hereby certified that on this 21st day of March in the year of our Lord one thousand eight hundred and fifty-three, before me, the subscriber, a commissioner appointed by the governor of the State of Virginia for the said State of Maryland, personally appeared Thos. Swan, the President of the said North Western Virginia Railroad Company, whose name is signed to the writing above bearing date on the 21st day of March, 1853, and acknowledged the same before me, in the State aforesaid, to be the [fol. 16] act and deed of the said North Western Virginia Railroad Company.

Given under my hand and seal on the day and year first aforesaid.
Jabez D. Pratt, Com'r for Virginia. (L. S.)

VIRGINIA, ss:

I, H. H. Dils, of the County Court of Wood County, do hereby certify that the foregoing is a true copy of a mortgage from the North Western Virginia Railroad Company to the Mayor and City Council of Baltimore, together with the certificate of acknowledgment by Thomas Swan, President of the North Western Virginia Railroad Company thereafter written, and that the same was received by me in my office for the purpose of being recorded, and admitted to record on the 24th day of March, 1853.

Attest: H. H. Dils, Clerk. (Seal.)

A copy from Deed Book No. 16, Page 430. Teste: B. F. Stewart,
C. M. C.

EXHIBIT "B" FILED WITH BILL OF COMPLAINT—Filed April 10, 1894

This indenture made this twenty-first day of March, in the year eighteen hundred and fifty-three, between the North Western Virginia Railroad Company, a corporation, created by an Act of the General Assembly of the State of Virginia, passed on the 14th day of February in the year eighteen hundred and fifty-two of the first part, and the Baltimore & Ohio Railroad Company of the second part.

Whereas, the said Baltimore and Ohio Railroad Company, by a resolution passed on the — day of —, in the year eighteen hundred and fifty-three, agreed to guarantee the bonds of the North Western Virginia Railroad Company, aforesaid, for the sum of one million dollars, in sums of one thousand dollars and five hundred [fol. 17] dollars, payable on the first day of January in the year

eighteen hundred and seventy-three, in the City of Baltimore, with interest at the rate of 6% per annum, payable semi-annually on the first day of July and January in each and every year. (In the mean while the said principal and interest being secured by a pledge of the property of the said North Western Virginia Railroad Company, subject to a mortgage to the Mayor and City Council of Baltimore, to secure the guarantee given by that corporation to the amount of one and a half millions of dollars).

And whereas, the said parties of the first part have issued the bonds referred to bearing even date herewith, for the sum of one million of dollars in the following words and figures:

\$1,000.

No. —.

United States of America, State of Virginia

North Western Virginia Railroad Company

Parkersburg, January 1, 1853.

This is to certify that the North Western Virginia Railroad Company, a corporation, created by an Act of the General Assembly of the State of Virginia, passed on the fourteenth day of February, eighteen hundred and fifty-one, are indebted unto ——— or bearer in the sum of five hundred dollars, lawful money of the United States of America, payable on the first day of January in the year eighteen hundred and seventy-three in the City of Baltimore on the surrender of this certificate of loan, with interest thereon in the interval, at the rate of 6% per annum, payable semi-annually in the City of Baltimore on the first days of July and January in each and every year on the presentation of the respective half yearly coupons hereto attached. (Which payment of principal and interest is secured by the guarantee of the Baltimore & Ohio Railroad hereon indorsed and by virtue of, and in conformity with the Act of the General Assembly of Virginia passed as aforesaid, the property [fol. 18] of the said Company is hereby pledged for the payment of the principal of this certificate and the interest that may accrue thereon, according to the terms of a mortgage from the said North Western Virginia Railroad Company to the said Baltimore & Ohio Railroad Company, bearing even date herewith.

It being hereby declared however, that this certificate of loan shall be convertible at the pleasure of the holder, into stock of the company at par at any time prior to the first day of March, 1860.

In witness whereof, the president of the North Western Virginia Railroad Company hath hereunto set his hand and caused the seal of the said company to be affixed hereto on the first day of January in the year eighteen hundred and fifty-three.

Thomas Swan, President. Countersigned: P. G. Van Winkle, Secretary.

On which there is endorsed the following guarantee by the said Baltimore & Ohio Railroad Company, "for value received, the Balti-

more & Ohio Railroad Company do hereby guarantee the payment of the within certificate of loan with the interest thereon according to its tenor under the authority of an Act of the General Assembly of Maryland, passed on the 29th day of May, 1852, entitled "An Act to permit the Baltimore & Ohio Railroad Company, to lend their aid or credit to the North Western Virginia Railroad, and in pursuance of a resolution of the Board of Directors of the said Baltimore & Ohio Railroad Company passed on the — day of — in the year eighteen hundred and fifty-three, it being understood that this guarantee shall not affect the dividends to which the State of Maryland would be entitled as a stockholder in the Baltimore & Ohio Railroad Company or interfere with any existing priorities of the said State.

In witness whereof, the President of said Baltimore & Ohio Railroad Company hath hereto set his hand and caused the seal of said [fol. 19] company to be affixed hereto, this — day of —, in the year eighteen hundred and fifty-three.

— —, Secretary. — —, President.

And whereas, it is the purpose of the said parties of the first part to execute the mortgage referred to on the face of the said certificate of loan, now this indenture witnesseth: that the said parties of the first part, for and in consideration of the premises and of the sum of \$5 to them paid, by the said party of the second part, at and before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, and in pursuance of the authority given by the fourth section of the Act of Assembly of Virginia, aforesaid, have granted and by these presents do grant unto the said parties of the second part all the property of the North Western Virginia Railroad Company of every kind, nature and description, the same may be as well, that which they may at the time actually hold as that which in the prosecution, stocking, completion and working of the said railroad, shall be accumulated thereon.

In trust to secure the payment of the said bonds or certificates of loan hereinbefore mentioned, and the interest thereon according to their tenor subject, nevertheless, to a prior mortgage to the Mayor and City Council of Baltimore as indemnity against loss consequent upon the guarantee by the said Mayor and City Council of the certificates of loan of the said parties of the first part, for the sum of one million, five hundred thousand dollars, and the said North Western Virginia Railroad Company have directed Thomas Swan, their president, to acknowledge this indenture before any person or persons having authority by law to take the said acknowledgment in order that this indenture may be duly recorded.

In testimony whereof, the said North Western Virginia Railroad Company have caused these presents to be sealed with their seal and to be signed by their president on the day and year first above written.

Thomas Swan, President N. W. Va. R. R. Co.

[fol. 20] Signed, sealed and delivered in the presence of — —.

STATE OF MARYLAND,
City of Baltimore, ss:

On this 21st day of March in the year eighteen hundred and fifty-three. Before me, the subscriber, a commissioner appointed by the Governor of the State of Virginia for the said State of Maryland, personally appeared Thos. Swan, the president, of the said North Western Virginia Railroad Company, whose name is signed to the writing above bearing date on the twenty-first day of March, 1853, and acknowledged the same before me, in the State aforesaid, to be the act and deed of said North Western Virginia Railroad Company.

Given under my hand and seal the day and year aforesaid.
Jabez D. Pratt, Comr. for Virginia.

Form of the above deed approved.
Benj. C. Procpman, Counsellor for the City of Baltimore.

VIRGINIA, ss:

I, Henry H. Dils, Clerk of the County Court of Wood County, do hereby certify that the foregoing is a true copy of a mortgage from the Northern Western Virginia Railroad Company to the Baltimore & Ohio Railroad Company, together with the certificate of acknowledgment of Thos. Swan, the President of the said North Western Virginia Railroad Company there above written and that [fol. 21] the same was received by me in my office for the purpose of being recorded and admitted to record on the 24th day of March, 1853.

Henry H. Dils, Clerk. (Seal.)

A copy from Deed Book No. 16, page 432. Teste: B. F. Stewart,
C. M. C.

EXHIBIT C FILED WITH BILL OF COMPLAINT—Filed April 10, 1894

This deed made this thirteenth day of March, in the year 1854, between James M. Stephenson and Agnes, his wife, John J. Jackson and Jane, his wife, John F. Snodgrass and Virginia, his wife, John R. Murdoch and Elizabeth, his wife, and Beverly Smith, of the County of Wood, State of Virginia, of the first part and the North Western Virginia Railroad Company of the second part, witnesseth that: the parties of the second part for and in consideration of the sum of sixteen thousand dollars paid to them in the convertible coupon bonds of the said company for the sum of five hundred dollars each, bearing date on the first day of January last and payable ten years thereafter, with interest thereon from the date thereof, payable semi-annually for which coupons are attached, the said bonds being numbered from Nos. 25 to 38 and Nos. 51 to 68, inclusive, and for the payment thereof a lien is hereby expressly reserved by the parties of the first part upon the premises hereinafter mentioned, have granted, bargained and sold and by these presents

do grant, bargain, sell and convey unto the parties of the second part all the land situated, in the town of Parkersburg, between Ohio Street and the Ohio River from Washington street to a point one hundred feet above the southwesterly or lower corner of the State wharf, at or near the mouth of the Little Kanawha River and between Kanawha street and the last named river from the water wharfing and all other rights, privileged and appurtenances thereunto belonging or in any wise appertaining, and it is virtually understood and agreed between the parties hereto that the said North Western Virginia Railroad Company are hereby forever prohibited [fol. 22] from establishing ferries across either of the said rivers within the limits aforesaid, but that the said company shall at all time have the privilege without infringement of the ferry rights of the parties of the first part, their heirs or assigns to convey across the Ohio River from the town of Parkersburg in boats to the provided by the said company, all passengers, goods and merchandise transported free of any charge for the same or other interference or disturbance by the parties of the first part, but shall not by virtue of anything herein contained convey across the said river for hire or compensation or otherwise and persons, goods or merchandise, except their agents and servants employed on their said boats other than those transported over their said railroad as aforesaid. And it is further understood and agreed between the parties hereto, that the land retained by the parties of the first part near the mouth of the little Kanawha River, shall not be used or occupied by the parties of the first part, their heirs or assigns for any purpose of purposes other than those connected with the free use and enjoyment of their ferries across the Ohio and Little Kanawha Rivers and that the parties of the second part shall not use or occupy any portion of the land lying between Ann Street and in lot No. 1 and the said river or either of them, except for wharfing purposes so that there may be at all times egress and regress to and from the wharf or landing of the parties of the first part. To have and to hold the land hereby conveyed unto the parties of the second part subject to the agreements and conditions herein contained and the parties of the first part hereby covenant and agree with the parties of the second part to warrant generally the premises and appurtenances hereby conveyed.

Witness the following signatures and seal:-

J. J. Jackson (Seal), Jane E. B. Jackson (Seal), Jno. R. Murdoch (Seal), E. C. Murdoch (Seal), J. M. Stephenson (Seal), Agnes M. Stephenson (Seal), B. Smith (Seal), John F. Snodgrass (Seal), Virginia S. Snodgrass (Seal).

[fol. 23] WOOD COUNTY, To wit:

I, Stephen C. Shaw, a Notary Public, for the County aforesaid, in the State of Virginia, do certify that Jane E. B. Jackson, wife of John J. Jackson, E. C. Murdoch, wife of John R. Murdoch, and Agnes M. Stephenson, wife of James M. Stephenson, whose names are signed to

the foregoing writing bearing date on the 13th day of March, 1854, personally appeared before me in the County aforesaid and being examined by me apart from their respective husbands, and having the said writing fully explained and made known to them, they, the said Jane E. B. Jackson, E. C. Murdoch and Agnes M. Stephenson, each and individually acknowledged the said writing to be their act and that they had executed the same willingly and each of them declared that they had no wish to retract it, and I, the said Notary Public, do further certify that the said John J. Jackson, John R. Murdoch and James M. Stephenson, whose names are signed as aforesaid each individually and acknowledged the same before me in my county aforesaid and I, the said Notary Public, do further certify that Beverly Smith, whose name is also signed to the said writing bearing date as aforesaid, has acknowledged the same before me in my county aforesaid. Given under my hand this 13th day of March, 1854.

S. C. Shaw, Notary Public.

WOOD COUNTY, To wit:

I, Dan R. Neal, a Notary Public for the County aforesaid in the State of Virginia, do certify that Virginia S. Snodgrass, the wife of John F. Snodgrass, whose names are signed to the writing hereto annexed, bearing date on the 13th day of March, 1854, personally appeared before me in the county aforesaid and being examined by me prively and apart from her husband and having the writing aforesaid fully explained to her, she, the said Virginia S. Snodgrass, acknowledged the said writing to be her act and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand this 14th day of April, A. D., 1854.

Dan R. Neal.

[fol. 24] DISTRICT OF COLUMBIA,

City and County of Washington, To wit:

I, Charles De Selding, a Commissioner, appointed by the Governor of the State of Virginia for the said District of Columbia, certify that John F. Snodgrass, whose name is signed to the writing within bearing date on the thirteenth day of March, in the year 1854, has acknowledged the same before me in my district aforesaid.

Given under my hand this thirteenth day of March, A. D., 1854. Charles De Selding, Commissioner of the State of Virginia (for the State of Virginia).

Wood County Court Clerk's Office

14th April, 1854.

The foregoing deed from John J. Jackson and wife, John R. Murdoch and wife, James M. Stephenson and wife, Beverly Smith and John F. Snodgrass and wife, to the North Western Virginia Railroad Company with the certificates of their several acknowledgments and the relinquishments of dower annexed was this day received in said office and admitted to record.

Teste: H. H. Dils, C. M. C.

A copy from Deed Book No. 17, page- 169, 170 and 171. Teste:
B. F. Stewart, C. M. C.

EXHIBIT "D" FILED WITH BILL OF COMPLAINT—Filed April 10,
1894

"Ordinance to permit the North Western Railroad Company to cross Harris street, and for other purposes."

This Ordinance was Regularly Passed by the Town Council on [fol. 25] December 28th, 1852, and Ordered to be Recorded, but is now Lost or Misplaced and Can not be Printed in Full.

A contract made by the Town of Parkersburg, with the North Western Va. R. R. Company, granting wharf privileges—exemption from taxation and "the Earth."

Special Meeting, June 8th, 1855

The Committee appointed to confer with the Railroad Co. and instructed at the last meeting to close a contract with the said company in accordance with proposition made by the President of said company as set forth in the following resolutions, which were offered by said committee and unanimously adopted and ordered to be made a part of the minutes of the meeting:

Resolved, that the President be and he is hereby authorized and directed to execute and deliver to the North Western Virginia Railroad Company for and on behalf of the President, Recorder and Trustees of the Town of Parkersburg, a deed or deeds to be approved by the Council of the Town and to be executed also on the part of the said company to carry into full effect the following stipulations which have been assented to by the President of the said company subject to the ratification of his board, and are hereby assented to by this Council, viz:

1. The Town to grant to the said company, so long as they shall continue to occupy the same for purposes connected with their business, the free and exclusive use of the land, banks, shores and water rights included within the following boundaries or appurtenant to the same, or any part thereof, except as herein excepted; that is to say, so much of the town as lies between Kanawha Street and the middle of the Little Kanawha River, and extending from the upper, or easterly side of Ann Street to the lower, or westerly side of Green street, including the streets and alleys crossing the same; except, that in constructing their buildings, or other improvements, on or over the streets and alleys crossing as aforesaid, they shall so construct [fol. 26] them as to permit the passage of persons and vehicles along the same without unnecessary obstruction, and excepting the privileges heretofore granted to the Little Kanawha Bridge Company so long as the Company continues.

2. The Company to grant to the Town all the right, title and interest and estate acquired by them under the deed from John J. Jackson and others, in and to the rest or residue of the land, banks and shores in front of the said Town, with the water rights and other appurtenances to be used exclusively for wharfs and landings and other purposes connected with the use of the Ohio and Little Kanawha Rivers, and to be improved by the Town from time to time, as occasion may require for such purposes.

3. The Company to construct a graded wharf to be completed by the time their road is opened to the public, if practicable, extending from the upper line of Ann Street around the point to the upper line of Kanawha Street, extended to the Ohio River; and within three years thereafter to construct a wharf with suitable grade at the foot of Court Street, the same to be sixty feet wide, as much thereof as may be necessary to be for the use of the Ohio Ferry, if the owners of the same will accept it in lieu of their present privileges at or near the point.*

*NOTE.—The building of wharf at foot of Court street, as provided for in Section 3 was, years after, released to the company for a money consideration.

4. The Town may charge wharfage on all steamboats and other crafts landing or lying at any part of the town, except on boats owned or chartered by the Company, or in their service, or running in connection with their road and landing or lying at their wharf with the permission of the Company; but the rates of the wharfage shall not exceed the lowest rates charged at the time at Pittsburgh, Wheeling, Cincinnati or Louisville, without the consent of the Company, and no wharfage shall be charged on any boat bound up the Ohio River and stopping merely to land passengers and their baggage. The money received by the town for wharfage shall be applied so far as may be required to keeping the wharves not owned by the Company, in good repair and to extending and improving the wharf accommodations as the business of the Town may require, and the Town shall pass and keep in force all ordinances, rules and regulations necessary to protect the Company in the free and undisturbed enjoyment and use for the purpose of their business of their wharf and other property rights and privileges within the Town.

5. The Company to be authorized to lay and use tracks with suitable switches and turnouts along and across such of the streets of the Town as they may deem necessary to connect their station with each other and with their like privileges, and subject to the same terms, conditions and penalties as are provided by the ordinance now in force authorizing them to lay and use tracks in certain streets of the Town. The Company to grade and keep in repair, between the sidewalks, those parts of the streets along which their tracks pass, including the crossings, and to construct and maintain a culvert across Kanawha Street to the river, on the line of Juliana street, for the free passage of the waters of Rifle Run.

6. All the property of the Company within the Town, while the same continues to be used by them, for or is appropriated to the business of their road, shall be free from all town taxes and assessments, and all privileges hereby granted or secured to the Company, shall apply as well to property and rights hereafter acquired by them, as to those they now acquire or possess.

EXHIBIT E FILED WITH BILL OF COMPLAINT—Filed April 10, 1894

This deed made this eight day of June, in the year one thousand eight hundred and fifty-five, between the President, Recorder and Trustees of the town of Parkersburg of the first part, and the North Western Virginia Railroad Company of the second part,

Witnesseth: That the parties of the first part, in consideration of the grants, conveyances, covenants and stipulations of the parties of [fol. 28] the second part herein contained, and of the sum of one dollar, received from them, do hereby grant, convey and assure to the parties of the second part, the free and exclusive use and occupation of the lands, banks, shores and water rights included within the following boundaries or appurtenant to the same or any part thereof; that is to say, so much of the said town as lies between Kanawha Street and the Little Kanawha River, and between the Easterly or upper line of Ann Street, and the lower or westerly line of Green street, including so far as may be lawfully included, the use and occupation of the streets and alleys running from Kanawha street to the Little Kanawha River, except that in constructing their buildings and other improvements along or across the said street, the parties of the second part shall so construct them as to permit the passage of persons and vehicles along the said streets and except the privileges heretofore granted to the Little Kanawha Bridge Company so long as the same shall continue. To have and to hold the same to the parties of the second part and their successors so long as they shall continue to use and occupy the same for purposes connected with the business of their railroad free of rent or other compensation for the use and occupation thereof, than is herein expressed. And the parties of the first part for the like consideration do hereby further grant to the parties of the second part in addition to the similar privileges granted to them by an existing ordinance passed on the 25th day of October, 1852, which are hereby confirmed, the right to lay and use railroad tracks, with suitable switches and turnouts along and across such of the streets and alleys of the said town as they may deem necessary to connect their stations and other improvements to be used by them for purposes connected with the business of their railroad with each other and with their lines at the point where they may enter the town, to be constructed and used in the same manner with the like privileges and subject to the same terms, conditions and penalties as are mentioned more particularly by the ordinance aforesaid; provided, however, that the parties of the second part shall grade and keep in repair between

the side walk those parts of the streets and alleys of the said town along which their tracks pass or are laid, including the crossings [fol. 29] and shall construct and maintain a culvert across Kanawha street on the line of Julian street sufficient to discharge the water at any time flowing through Rifle Run.

And the parties of the first part for the like consideration do further grant and covenant to and with the parties of the second — that all the property owned, used or occupied by the parties of the second part within the jurisdiction of the parties of the first part, so long as the same is used or appropriated by them to purposes connected with the business of the railroad, shall be free from all town taxes, assessments and charges, and that all the privileges hereby granted and assured by the parties of the first part to the parties of the second part, shall apply as fully to property and rights hereafter required, used or occupied by them within the said town and jurisdiction, as to those they now own, use or occupy, or may hereafter use and occupy, and subject to the like conditions and limitations. And in consideration of the foregoing grants, covenants, agreements and stipulations of the parties of the first part, the parties of the second part do hereby grant and convey with special warranty only to the parties of the first part and their successors, all the right title, interest and estate granted and conveyed to them, the parties of the second part by deed from John J. Jackson and others now of record in Wood County, Va., and to the use and residue not hereinbefore mentioned, to be used and occupied by the parties of the second part of the lands, banks and shores described in the said deed with the water rights and appurtenances thereunto belonging to be used exclusively for wharves, landings and other purposes connected with the use of the Ohio and Little Kanawha Rivers, and to be improved by the parties of the first part and their successors for such purposes from time to time as the business and convenience of the said town may require or render necessary or desirable, and it is agreed by the parties hereto that the parties of the first part may charge wharfage on all steamboats and other craft navigating the said rivers and landing or lying at or in front of any part of the said town except on Boats or other craft owned or chartered by the parties of the second part or otherwise employed in their service or running in connection with their railroad, and landing or lying at their wharves and improvements with their permission or [fol. 30] consent, but the rate of wharfage which shall be fixed from time to time by ordinance or ordinances of the parties of the first part, shall not exceed the lowest rates charged at the time at Pittsburgh, Wheeling, Cincinnati or Louisville, without the consent in writing of the parties of the second part, or their duly authorized agent, and no wharfage shall be charged without such consent or any boat bound up the Ohio River and stopping merely to land passengers and their baggage, and the money received for wharfage shall be applied under the direction of the parties of the first part, so far as may be required to keep the wharves and landings of the said town not owned and used by the parties of the second part, in

good repair and to extending and improving the wharves and landings of the town as its business may require. And the parties of the first part shall pass and keep in force such ordinances, rules and regulations as may be necessary to protect the company in the free and undisturbed enjoyment and use for the purposes of their business, of their wharves, rights, privileges and improvements within the said town. And for the like consideration, the parties of the second part do hereby covenant and agree to and with the parties of the first part that they, the parties of the second part, will, at their own costs and charges construct and pave or macadamise a wharf of suitable grade and complete the same if practicable by the time their railroad is formally opened for public use, extending from the upper or easterly side of Ann street in the said town along the Little Kanawha and Ohio Rivers to an extension of the upper line of Kanawha street, and that they will, within three years thereafter, construct a similar wharf of the width of sixty feet at the foot of Court street on the Ohio River, the same to be for the use of the Ohio River Ferry from the said town, if the proprietors thereof, will, on its completion consent to accept the same in lien of their present landing, the said wharves so to be constructed when completed to become the property of the parties of the first part and their successors. In testimony whereof, the parties to these presents have caused the same to be signed by their respective Presidents, and their respective seals to be hereto affixed the day and year first above written.

(Signed) H. Logan, President. Thos. Swann, President.
[fol. 31] (Seal Town of Parkersburg, Incorporated 1820.)
(Seal North W. V. R. R. Co., Incorporated Feb. 14, 1851.)

EXHIBIT "F" FILED WITH BILL OF COMPLAINT—Filed April 10,
1894

Proceedings of Council of July 13, 1855

Regular Meeting, July 13, 1855

The President, one the part of the Committee, appointed at a special meeting of the Board, June 7th, to close a contract with the N. W. V. Railroad Company, in accordance with propositions made by the President of said Company for the adjustment of the conflicting titles to the Ohio and Kanawha River banks in front of said Town, reported that a deed had been made and executed by the President on the part of the Council, and by Thos. Swan, President of said Railroad Company, on the part of said Company, each conveying to the other their interest in certain portions of said river banks and other rights and privileges as set out in the resolutions adopted at a special meeting of the Board, June 8th, 1855, which deed is now of record in the Clerk's office of the County Court of Wood County.

EXHIBIT "G" FILED WITH BILL OF COMPLAINT—Filed April 10,
1894

Sections of Ordinance of May 30, 1865

Sec. 3. Permission is hereby further given to the said company to use steam or other power for drawing or propelling their cars and trains over any railroad track, the construction and use whereof is authorized or intended to be authorized by this or any future [fol. 32] ordinance, subject as to such construction and use to all the provisions and restrictions, so far as applicable of an ordinance of the President, Recorder and Trustees of the town of Parkersburg, entitled "An ordinance to permit the Northwestern Virginia Railroad Company to lay rails along certain streets of the town, and for other purposes," passed October 25, 1852, which, together with the deed of conveyance and agreement between the said President, Recorder and Trustees, and the said Northwestern Virginia Railroad Company, bearing date on the 8th day of June, in the year one thousand eight hundred and fifty-five, and of record in the County of Wood, and State of West Virginia, and all other ordinances and parts of ordinances heretofore passed by the said town, and accepted by the Northwestern Virginia Railroad Company, and not repealed, are hereby declared to be in full force and binding on the City of Parkersburg, and the said Parkersburg Branch Railroad Company as the successors, respectively of the former parties thereto.

EXHIBIT "H" FILED WITH BILL OF COMPLAINT—Filed April 10,
1894

An Ordinance to Widen Washington Street and to Authorize the Parkersburg Branch Railroad Company to Extend Their Track Through the City to the Ohio River.

Passed May 10, 1867

Be it ordained by the Mayor and Council of the City of Parkersburg:

Sec. 1. That the Parkersburg Branch Railroad Company, late the Northwestern Virginia Railroad Company, are hereby authorized and empowered to construct, extend and continue their railroad with a single track and necessary sidelings, switches, embankments, piers, pillars, abutments and appurtenances from their property on the southerly side of Green street, across the same, and along Washington street, either within its present or future boundaries of that [fol. 33] street, or in any part of its course, upin land to be acquired on either side of that street, to or near the site of the railroad bridge proposed to be built across the Ohio River, near the terminus, on

the said river, of the said Washington street, in the City of Parkersburg, and to unite said extension with said bridge, and, at the option of said company, to make the same a part thereof—the said extension to be constructed in accordance with the plan and profile thereof, furnished by J. L. Randolph, Esq., Civil Engineer, now on file in the office of the Mayor of said City, and marked a "Substitute for Arcada," and dated March 7, 1867, unless a departure therefrom is hereafter authorized by an ordinance of the Mayor and Council of the said City, except that there shall be no pillar or pier on Market street, Juliana or Ann streets, nor shall any pillar or pier be more than thirteen feet in width across Washington street at the level of Ann street, and the lower or under side of the track across Market street, Juli-Ann and Ann streets, shall be at least everywhere thirteen feet above the surface. The sidewalks on Washington street between Market, Avery and Green streets, and the free and convenient passage of persons and drays, wagons and other vehicles across Avery and Green streets, shall not be obstructed, and whenever the track or bed of the said extension is elevated above the surface of Washington street, or any street, it shall be so constructed that no water, cinder, rubbish or other substance can fall from the same and any person who may throw or cast, or wilfully or carelessly permit to fall from such elevated track or bed, any substance whatever, shall be liable to a fine of not exceeding twenty dollars for each and every distinct offense, to be recovered as other fines and penalties are recoverable.

Sec. 2. Permission is hereby given to the said Parkersburg Branch Railroad Company to close and appropriate to their exclusive use and control, so much of the alley known as St. Cloud Court, lying between Green and Avery Streets, as extends from Washington to Littleton street, so long as they continue to use the square bounded by the four said streets for depot, station or other purposes connected with the business of their railroad; and the said railroad company are hereby authorized and empowered to lay and construct [fol. 34] as many tracks of rails, switches and turn-outs along and across Green and Washington streets, at and near the intersection of the said streets as they may deem necessary or desirable for more conveniently entering and departing from said square with their engines, cars and other rolling stock.

Sec. 3. Permission is hereby further given to the said company and to any other railroad company, which, with their consent, shall use said bridge and tracks, to use steam or other power for drawing or propelling their cars and trains over any railroad track, the construction and use whereof is authorized, or intended to be authorized by this ordinance, subject as to such construction and use to all the provisions and restrictions so far as applicable, of an ordinance of the President, Recorder and Trustees of the Town of Parkersburg, entitled, "An ordinance to permit the Northwestern Virginia Railroad Company to lay rails along certain streets of the Town, and for other purposes;" passed October 25th, 1852, which, together

with the deed of conveyance and agreement between the President, Recorder and Trustees, and the said Northwestern Virginia Railroad Company, bearing date on the 8th day of June, in the year one thousand, eight hundred and fifty-five and of record in the County of Wood, and State of West Virginia; and all other ordinances and parts of ordinances heretofore passed by the said Town, and accepted by the Northwestern Virginia Railroad Company, and not repealed, and not conflicting with this ordinance, are hereby declared to be in full force, and binding on the City of Parkersburg, and the said Parkersburg Branch Railroad Company, as the successors, respectively, of the former parties thereto. By the provisions of the first section of said ordinance of October 15th, 1852, shall not be applied to the said extension, hereby authorized.

Sec. 4. The permission and privileges granted by the ordinance are upon the following terms and conditions and not otherwise, namely:

That the said Parkersburg Branch Railroad Company shall, without unnecessary delay, proceed to the construction of the wharf at [fol. 35] the foot of Court Street, on the Ohio River, in the said city, as provided in the said deed of conveyance and agreement, on or before the 1st day of December, in the year one thousand, eight hundred and sixty-eight, the said wharf to have the same gradients, and to extent as far from the outer line of Ohio Street into the Ohio river as the wharf constructed by the said City, between Kanawha and Neal streets; and when completed to be the property of the said City, and under the exclusive care and control of the Mayor and Council thereof.

Sec. 5. And be it further ordained, that the said Washington street between Avery street and the point of divergence from said street by the said railroad track, or the superstructure supporting the same, shall be widened by the addition of twenty feet of ground, to be obtained on either or both sides of said street, so that the whole width of said Washington street, between the points aforesaid, shall be sixty feet from side to side, including the sidewalks and the ground occupied by said railroad company.

Sec. 6. If the land required for the purposes of this ordinance, or any part thereof, can not be purchased or otherwise obtained by agreement with the owners, thereof, to the satisfaction of the Mayor, he is hereby further authorized and directed to cause application to be made to the Circuit Court of Wood County, to appoint Commissioners as provided by law for the purpose of ascertaining a just compensation for any part of such land according to the laws applicable and in force in such cases.

Sec. 7. It shall be lawful for the Mayor, and he is hereby authorized and empowered to extend the time for the removal of any buildings or other improvement, or any part of either, situated on any part of the land so purchased or obtained for any time that he may deem proper and expedient, not exceeding one year from and after

the passage of this ordinance, upon such terms and conditions as may be assented to by the parties in interest, by a suitable instrument in writing, duly signed, except that the Parsonage of the [fol. 36] Catholic Church is not to be removed under this ordinance unless the consent of the owners is first obtained.

Sec. 8. The land to be acquired as aforesaid on either or both sides of Washington street shall be conveyed to the said City, except that if said company shall determine to construct said extension, or any part of it outside of the present boundary of that street or either side thereof, then the land so to be acquired shall be conveyed to said company, and in that case the said company is to leave a pass-way of at least seven feet in width between the piers or abutments, and the outside boundary of the streets as widened, except along the Catholic Parsonage while it remains, and also to leave the spaces between the piers on Washington Street as ordained, free and unobstructed, and under the jurisdiction of the City for police and street purposes, limited only by the rights and privileges properly incident to the use of the property for the purposes of said extension and bridges.

Sec. 9. For the purpose of paying all the expenses and damages incident to widening said Washington street, as aforesaid, including a just compensation for the land to be acquired for said street or said railroad, it is further ordained that the City of Parkersburg appropriate fifteen thousand dollars in the bonds of the said city, payable twenty years after date, with interest at the rate of six per centum per annum, payable semi-annually, and that such bonds be delivered to said Railroad Company, to be disposed of or used for said purposes, by said company, upon said company agreeing to pay such additional sum as shall be necessary for the purpose of paying said expenses and damages, and the said Railroad Company shall indemnify the said City against all damages which shall be lawfully recovered from or awarded against said City (including cost), by reason of the construction of said railroad along Washington street, pursuant to this ordinance.

Sec. 10. This ordinance shall be of force and effect whenever the said Parkersburg Branch Railroad Company or its assigns, shall signify their acceptance of the same, and their assent to all the terms, conditions and stipulations herein contained, by a suitable [fol. 37] instrument in writing, signed by their President, or any authorized agent, provided the same is filed with the Mayor and Council in ninety days from the date of the passage of this ordinance; and provided, further that when said acceptance is filed the Railroad Company shall commence their work on the bridge within thirty days after filing the same; and such acceptance and assent, together with this ordinance shall have all the force and effect of a contract or an agreement between the said company and the said city. All ordinances, and parts of ordinances heretofore adopted, which conflict with this ordinance, are hereby repealed.

.Acceptance

The Parkersburg Branch Railroad Company hereby accept and assent to all the terms, conditions, provisions and stipulations of an ordinance of the Mayor and Council of the City of Parkersburg, passed on the 10th day of May, last, entitled, "An Ordinance to widen Washington Street, and authorize the Parkersburg Branch Railroad Company to extend their tracks through the City to the Ohio River," and do hereby agree that this acceptance and assent, together with the said ordinance, shall have all the force and effect of a contract or agreement between the said Company and the said City.

In witness whereof, the said Parkersburg Branch Railroad Company, have caused these presents to be signed by their President, this 3rd day of August, in the year one thousand, eight hundred and sixty-seven.

EXHIBIT "I" FILED WITH BILL OF COMPLAINT—Filed April 10, 1894

An ordinance to amend and re-enact the ordinance passed May 10, 1867, entitled "An ordinance to widen Washington street, and to authorize the Parkersburg Branch Railroad Company to extend their track through the city to the Ohio River."

[fol. 38] *But* it ordained by the Mayor and Council of the City of Parkersburg:

Sec. 1. That if the Parkersburg Branch Railroad Company shall, within thirty days from and after the passage of this ordinance, pay to the City of Parkersburg, the sum of seven thousand, five hundred dollars, the said sum shall be received as a performance and discharge of the terms and conditions of the fourth section of the ordinance passed May 10, 1867, entitled, "An Ordinance to widen Washington street, and to authorize the Parkersburg Branch Railroad Company to extend their track through the City to the Ohio River." And the said Parkersburg Branch Railroad Company shall, upon the payment of said sum of money, stand released and discharged from the building of the wharf at the foot of Court Street on the Ohio River in the said City, as required by the contract or agreement existing between the said Company and the City of Parkersburg, contained in the ordinance aforesaid, which is hereby re-enacted and declared in full force, subject to the amendments herein contained.

Sec. 2. Permission is hereby granted to the said Parkersburg Branch Railroad Company to lay and construct a temporary railroad track, with suitable switches, turn-outs and crossing thereof, from their property on Green street, across the said street, along Washington street and across Ohio street, to a point at or near the site of the railroad bridge now in process of construction across the Ohio River,

and to continue and maintain the same until the said bridge is completed. But the said temporary track shall be located, constructed and used, and the materials, machinery and implements used or to be used in construction of the said bridge, its piers, abutments and superstructure and temporarily deposited near the same, and the approach thereto, shall be so disposed and arranged as not to prevent the convenient passage along said Washington street, and intersecting streets, of drays, carts, wagons and other vehicles, or of foot passengers.

The said temporary track from Avery street to the Ohio River shall be constructed on the line of the piers and over their foundation [fol. 39] tion, so that the said temporary track shall not occupy more of the said street than is now occupied by the said piers.

Sec. 3. If the Mayor and Council of said City shall hereafter determine to construct a wharf at the foot of Green street, on the Little Kanawha River, in said City, for the accommodation of vessels and boats navigating the same, the said Railroad Company shall, by their assent to and acceptance of this ordinance, consent and agree that such wharf may be extended from the foot of Green street, down said Little Kanawha River to Avery street, outside of the railroad track on the bank of said river, leading to the depot buildings, so far as it may be necessary to give to said wharf a suitable grade. But no part of said wharf or extension shall be made to interfere with the railroad track now constructed along said bank to the river until after the railroad bridge, now building over the Ohio River, shall be completed and fit for use by said railroad company. But after the completion of said railroad bridge across the Ohio river, and the building of said wharf by the Mayor and Council of the City of Parkersburg, as aforesaid, should the said railroad company desire to maintain its track over said wharf to the Kanawha River, the gradients of said railroad track shall be made to conform to the gradients of said wharf or extension, as far as it is possible to do so, to give to said railroad track a practicable grade.

And the said wharf, when completed, shall be the property of the said city, and under the exclusive care and control of the Mayor and Council of said City, but nothing in this ordinance shall be so construed to deprive the said Railroad Company to have and maintain a railroad track over the said wharf to the Little Kanawha River hereinafore provided.

Sec. 4. This ordinance shall be in full force and effect from and after the acceptance thereof, in writing by the said Railroad Company, which writing shall be under the seal and signature of the President, and which shall constitute the agreement between the City of Parkersburg and said Railroad Company.

EXHIBIT "L" FILED WITH BILL OF COMPLAINT—Filed April 10,
1894

BALTIMORE & OHIO RAILROAD COMPANY

vs.

CITY OF PARKERSBURG

[fol. 41] In lots Nos. 132 to 139, inclusive: This constitutes Passenger Depot.

Outer Depot grounds.

Rights of Way from Outer to Passenger Depot.

Rights of way from Outer Depot to Inner River Station.

Two lots below Ann Street on north side of 6th street, included in Bridge Right of way.

Also lot adjoining Ice Factory in Bridge right of way.

Right of way east—Outer Depot to City limits on east.

IN U. S. CIRCUIT COURT

DECREE FOR TEMPORARY RESTRAINING ORDER, DATED APRIL
10, 1894

BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiffs,

vs.

THE CITY OF PARKERSBURG and JOHN W. DUDLEY, Sheriff of Wood
County, West Virginia

This day came the said plaintiffs, by their counsel, and here exhibited their certain bill of complaint, verified by affidavit, against the said defendants, and pray an injunction to restrain the defendants from all proceedings by way of levy upon, seizure or sale of property of the said plaintiffs, or otherwise to collect certain taxes in the said bill mentioned and claimed to be due to the said City of Parkersburg, for the year 1893, for use and purposes of said City from the said plaintiffs for taxes assessed as in the bill mentioned, which said bill having been seen and inspected by the Court, leave is given to file the same, and upon the motion of the said plaintiffs, by their counsel, the Court doth fix and designate the 15th day of the next term of this Court, as the time, and the Court House of Parkersburg, in the County of Wood, in said District as the place for the hearing and determination of said application for said injunction.

And upon the further motion of the said plaintiffs, by their counsel, process of subpœna is awarded them upon said bill against the defendants therein named, returnable at Rules to be held in the Clerk's office of this Court, and also a notification to be served upon

the said defendants, warning them to be and appear before the Judges of the Circuit Court of the United States, for said District at [fol. 42] the time and place hereinafter specified, to show cause why said injunction shall not be granted.

And upon the further motion of the said plaintiffs, and for reasons appearing to the Court, it is further ordered that upon due service of such subpoena in chancery and notification, and also a copy of this order upon the said defendants, the said defendants shall be and stand, and they are hereby temporarily enjoined and prohibited from all proceedings by way of levy upon, seizure or sale of property of the plaintiffs, or otherwise to collect the said taxes so claimed as aforesaid for the said year 1893, or any part thereof, this temporary injunction to continue until the said 15th day of the next term of this Court at Parkersburg, and until the hearing and determination of said application for said injunction as aforesaid.

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF
WEST VIRGINIA

[Title omitted]

DEMURRER TO BILL OF COMPLAINT—Filed May 7, 1894

The Demurrer of the Above-named Defendants to the Bill of Complaint of the Above-named Plaintiff

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, do demur to the said bill, and for causes of demurrer, show:

I. That it appears by the plaintiff's own showing by said bill that it is not entitled to the relief prayed for by its bill against these defendants.

[fol. 43] II. That it appears by the said bill by the plaintiff's own showing that the amount in controversy in this cause does not exceed Two Thousand Dollars (\$2,000).

III. That if it is true, as alleged in said bill, that the President, Recorder and Trustees of the Town of Parkersburg, and the City of Parkersburg, did make and confirm, respectively, the alleged contract in the said bill set forth, yet it does not appear from the said bill that the said alleged contracts were made and ratified by any authority of law.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, these defendants demur thereto. And they pray judgment of this Honorable Court whether they shall be com-

pelled to make any answer to the said bill and they humbly pray to be dismissed with his reasonable cause sustained.

John F. Laird, Smith D. Turner, of Counsel for the Defendants.

We hereby certify that the foregoing demurrer is, in our opinion, well founded in point of law.

John F. Laird, Smith D. Turner, of Counsel for the Defendants.

Jurat showing the foregoing was duly sworn to by W. H. Smith, Jr. Omitted in printing.

[fol. 44] IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWER OF THE CITY OF PARKERSBURG—Filed June 14, 1894

The Separate Answer of the City of Parkersburg to a Bill in Equity Exhibited Against It and John W. Dudley, Sheriff, by the Baltimore and Ohio Railroad Company, in said Court.

This defendant, by protestation, not confessing the sufficiency of the plaintiff's bill of the matters and things set forth, but saving unto itself all manner and benefit and advantage by way of objections, or otherwise, to said bill, for answer to so much thereof as this respondent is advised is proper, or necessary to be answered unto, answers and says:

The defendant admits the incorporation of the North Western Virginia Railroad Company under an Act of the General Assembly of Virginia found in said Acts of 1850-51, at pages 69 and 70; the exception of the mortgages shown by exhibit "A and B," filed with said bill; the execution of the deed of March 13, 1854, by John J. Jackson, et. al., to the said North Western Virginia Railroad Company; the records and proceeds of the town authorities, and the deed of June 8th, 1855, exhibited with the bill marked "D. & E"; the foreclosure of the said mortgages in 1865, the purchase thereunder by the complainant, and of the conveyance of the property so purchased to a new and distinct corporation by the name of the "The Parkersburg Branch Railroad Company," as will appear from a certified copy of said conveyance, herewith filed as a part hereof, marked "Exhibit 100."

The passage of all the ordinance of May 30, 1865, of which only a portion is shown by plaintiff's exhibit "G," the whole ordinance [fol. 45] being herewith filed as part hereof, marked "Exhibit 101"; The ordinance of May 10, 1867, and the ordinance of March 15, 1870, referred to in said bill, but the defendant does not admit that the plaintiff by the said bill correctly construes any one of the

several documents, records, and alleged contract as in and by its said bill has been attempted, and the defendant refers to each of the same respectively for the contents and proper construction thereof.

This respondent further answering says, that under the ordinance of March 15, 1870, there was paid to respondent \$7,500, but it is not true that the complainant, as respondent is informed and believes advanced that sum, or any other money on that account to respondent.

Respondent charges that the said \$7,500 was paid by the Parkersburg Branch Railroad Company, and that it, in no way, direct or indirect, has ever received from the complainant any sum under said ordinance, except as the fund of the Parkersburg Branch Railroad Company, and it expressly denies there was any pretense, whatever, at any time, made between this respondent or any one in privacy with this respondent and the complainant, under which the complainant should be exempted from the payment of taxation on any property owned by complainant, and it denies that any money was ever paid by the complainant to respondent in any way or at any time in consideration of any exemption of the complainant's property from taxation by the respondent.

Respondent further answering, says, that it does not admit the statement in complainant's bill to the effect that one of the reasons for making the alleged contract, June 8th, 1855, was to induce the North Western Virginia Railroad Company to make Parkersburg its western terminus; and respondent calls for full proof of that fact, if it be material; but respondent charges that if such motives and reasons be established, then, this respondent was grossly deceived and misled and all such matters in support of the contract failed, because the truth is, that about the year 1871, the complainant having control of the railroad from Grafton to Parkersburg, erected a bridge across the Ohio river at Parkersburg and by the system of railroad under the complainant's management and control, extended the line of traffic and railroad transportation several hundred miles, at least, west of the Ohio river.

[fol. 46] Respondent further answering, charges that the Town of Parkersburg subscribed Fifty Thousand Dollars to the stock of the North Western Virginia Railroad Company, and paid said subscription through bonds which were paid by taxes levied upon its citizens and property liable to taxation; and that such money was subscribed and paid by said town and nothing whatever, was received by it in stock-dividends or other incomes, and that by the sale of the said North Western Virginia Railroad Company in 1865, the whole of said investment was wholly lost; that the subscription of the town to the stock of the railroad exceeded several times the value of all the property conveyed by the railroad to the said town.

Further answering, this respondent says, that the pretended conveyance of land and water privileges in 1865 to the said town by the North Western Virginia Railroad Company is wholly mis-leading, the fact being, as the respondent is informed and believes, that the free and exclusive use and occupation of the more valuable portion

of said real estate and water privileges were in the same conveyance reconveyed to the said North Western Virginia Railroad Company, and by it, reserved for its own use and benefit, which has ever since been used by said road and the Parkersburg Branch Railroad Company.

Respondent admits that attempt was made by the paper of June 8, 1855, to grant to the North Western Virginia Railroad Company an exemption from taxation, but respondent charges that the same arose from an effort to help a new enterprise in which the said town of Parkersburg held stock, and respondent charges further that such attempt was wholly void; that there was no power or authority to grant such exemption, but on the contrary, such exemption was unlawful and against existing statutes and public policy, as fully appears from the general laws of Virginia in force at that time, governing municipal corporation, and the Acts of the General Assembly of Virginia passed on January 22, 1820, and in the Acts amendatory, passed on January 17th, 1826; March 26th, 1842; March 16, 1851, respectively, which constituted the sole authority of said town, and from which came the sole power of said municipality for said act. Which said Act of incorporation, and Acts [fol. 47] amendatory thereof are referred to and made a part thereof.

Respondent further answering denies that the said attempted contract of June 8, 1855, for the exemption from, or commutation of taxes assessible upon the property of the North Western Railroad Company, extended to the successors or assigns of the said North Western Virginia Railroad Company.

Respondent further answering denies that the said parties have acted upon and ratified and adhered to the covenants and stipulations in said deed of June 8th, 1855, contained, from that time to the present.

Respondent further answering says, that it is true that on the 15th day of February, 1865, the Baltimore and Ohio Railroad Company became the purchaser of the property of the North Western Virginia Railroad Company at the sale made to foreclose the aforesaid mortgage, and charges that upon the conveyance of the aforesaid property by the Mayor and City Council of the City of Baltimore, said property became a corporation by the name of "The Parkersburg Branch Railroad Company" and charges that the Baltimore and Ohio Railroad Company did, under and by virtue of the right vested — it by law, created as many shares of stock in said corporation, The Parkersburg Branch Railroad Company, as it saw fit, and that upon such conveyance being made, the said Parkersburg Branch Railroad Company became a separate and distinct corporate body from the said Baltimore and Ohio Railroad Company that had no ownership of the property of the Parkersburg Branch Railroad Company, and no interest therein, other than as stockholder. And respondent denies that the Baltimore and Ohio Railroad Company became the owner of the works and property of the North Western Virginia Railroad Company, as they were at the time of making the said mortgages aforesaid and all the other property of which

the North Western Virginia Railroad Company was seized and possessed at the time of said sale, but charges and avers that the same became the property and estate of the said Parkersburg Branch Railroad Company.

Respondent says that it is not true that the City of Parkersburg was incorporated in the year 1860, as the successor of the Town of [fol. 48] Parkersburg, but says it is true that the said City was incorporated on the 5th day of November, 1863, as appears from the Acts of the Legislature of the State of West Virginia of 1863.

Respondent further answering, denies that by virtue of its purchase of the property of the North Western Virginia Railroad Company, or otherwise, the said complainant, or the Parkersburg Branch Railroad Company, became entitled to the benefit of the illegal commutation and exemption provided for by the said deed and agreement attempted to be made as aforesaid, between the town of Parkersburg and the said North Western Virginia Railroad Company, and reiterates that so much of said deed and contract as attempted to provide for said alleged exemption and commutation was illegal and without any power or authority to make the same on the part of the said parties to said deed and contract, and further avers, that the said covenant and stipulation for said exemption was an illegal attempt to grant to the said North Western Virginia Railroad Company nothing more than a personal privilege which could not be transferred or assigned by it and which should expire with the said grantee, or at the pleasure of the Legislature.

Respondent further says that the said deed and ordinance of June 8th, 1855, and the ordinances afterwards adopted and passed by the officers and council of the town of Parkersburg and city of Parkersburg attempting to ratify the same, were all executed, made and passed without any power or authority whatever, on the part of the said officers; and they were all illegal and prohibited at the time they were executed, made and passed respectively; that the said officers and Council of the town of Parkersburg, and the said City of Parkersburg, knew said deeds, contracts and ordinances, as did the North Western Virginia Railroad Company, to be illegal and prohibited, and that the said Parkersburg Branch Railroad Company knew the same to be the fact at the time of the adoption and passage of said ordinance, and the payment of the said \$7,500.

Respondent further denies that it, by said ordinance, deeds or contracts, and by the acceptance of the said \$7,500, or by any other means, has ratified, or in any way confirmed the illegal contract of commutation and exemption, but that such alleged ratification [fol. 49] or confirmation was, and is wholly beyond the power of the said town of Parkersburg and the City of Parkersburg.

Respondent avers that in the year 1863, the State of West Virginia adopted a Constitution by which no other property than that which was specially named therein should be exemption from taxation, and further provided that the charters of all companies incorporated thereafter under the general laws of the State of West Virginia should be subjected to the power reserved to the said State to alter or amend such charters at the pleasure of the Legislature, and also

further provided that all the laws of the State of Virginia, not repugnant thereto, should be and continue, the law of the State of West Virginia until altered or repealed by the Legislature; and reference is here made to Section 1 of Act 8 and Sections 5 and 8 of Act 11 of said Constitution.

Respondent further shows that the said Parkersburg Branch Railroad Company was incorporated during the year 1865 and *were* subject to the aforesaid Constitutional provisions.

Further answering respondent say that by virtue of the general laws then in force and the Code of 1863, Chapter 47, sections 30 & 31, it was compelled to tax all the real estate and personal property within its corporate limits.

Respondent shows unto the Court that had the alleged exemption or commutation granted by the said City to the Parkersburg Branch Railroad Company been within the power of the said City, yet respondent avers that when, to-wit, — day of —, 1870, the said Company paid the sum of \$7,500 it well knew that the said exemption was to be enjoyed at the pleasure of the Legislature of the State of West Virginia and the City Council of the City of Parkersburg, and respondent avers that the said Legislature and respondent have been guilty of no fraud in longer refusing to permit the said Parkersburg Branch Railroad Company to enjoy a privilege of a yearly value of over \$1,000.00 for the inconsiderable sum of \$7,500.00, especially after the said company has been in default in the payment of taxes to an amount exceeding three times said amount; and in denying said exemption or commutation for the benefit of the Baltimore and Ohio Railroad Company. The fact the complainant has practiced fraud upon respondent in the manner [fol. 50] and under the circumstances hereinafter set forth as to the payment of taxes upon its property.

Respondent would further show unto the Court that it is at all times subject to the will of the Legislature by whose authority alone it exists and acts, and that the said Legislature of the State of West Virginia in the exercise of its sovereign power, by an Act thereof passed on the 28th day of February, 1877, and by acts amendatory thereof passed from time to time, took entirely away from and out of respondent's power the right to assess, levy and collect any taxes upon the property of the railroad companies used in connection with their business within its jurisdiction, and among others, the Parkersburg Branch Railroad Company and the Baltimore and Ohio Railroad Company, respectively, and vested the whole power of the assessment and collection of said taxes in the Board of Public Works and Auditor of said State.

And respondent further says, that by said statute its officers were compelled under a penalty of a heavy fine to certify to the Auditor of the State its levy for taxes for general purposes upon other property within its corporate limits, and that the taxes were then collected by the Auditor or under his direction, by the sheriff of Wood County, and by the one or the other paid to respondent's Treasurer.

And so completely has the said Legislature taken away from re-

spondent the power to levy and assess such taxes and the control of the collection thereof, that it has prohibited your respondent and its officers under the penalty of a fine from in any way compromising or remitting any portion of the taxes so assessed by said Auditor, even in case of a dispute between respondent and any railroad within its jurisdiction as to the validity of the tax or the amount assessed for respondent's benefit.

Respondent further says that by said statutory enactment (67th section) the President, Vice-President, Secretary, or other principal accounting officers of the Parkersburg Branch Railroad Company and the Baltimore and Ohio Railroad Company, respectively (for respondent avers that the said two companies are entirely separate and distinct corporations) were and are required, on or before the first day of April in each year, to make a return to the Auditor of the [fol. 51] State of West Virginia, signed and sworn to by said officer, showing the following particulars for the year ending on the 31st day of December, next preceding, viz.:

First. The whole number of miles of railroad owned, operated or leased by such corporation or company in the State.

Second. If such road be partly in the State and partly out; the whole number in the State and the whole number out of the State, including branches.

Third. The whole number of miles of track in each county, and the fair cash value per mile of such road in each county, including main track, branches, side and second tracks, switches and turnouts.

Fourth. All its rolling stock and the proportional value thereof in each county.

Fifth. All its real estate, other than tracks, buildings, &c., owned and used in connection with the road, and the cash value thereof in each county.

Sixth. Its personal property of every kind and description wholly held or used in this State, showing the amount and value thereof in each county.

Seventh. Its capital stock, and the number, amount and value in cash of the shares thereof; the amount of the capital stock paid in; its gross earnings, &c.

Eighth. Its gross expenditures for the year.

Respondent further shows unto this Honorable Court that by said statute it is further provided that all buildings and real estate owned by said Railroad Companies and used or occupied for any purpose not immediately connected with its railroad or which is rented or occupied for any purpose to or by individuals, shall be assessed with the taxes properly chargeable thereon, the same as other property of like kind belonging to an individual.

[fol. 52] And that by said statute it is further provided:

"No such company or corporation as is mentioned in this section shall be exempt from taxation, whether the same has been or may be created, organized or operated by, under or by virtue of any general or special law or laws, or whether heretofore exempted from the taxation or not, but this section shall apply to all such companies and corporations without distinction or exceptions."

Respondent would further show unto the Court that since the year 1875, the said city has had no authority to levy its taxes upon its values of property, other than as ascertained for State purposes; and that no census has so far shown that this defendant has a population of as many as 10,000 inhabitants.

Respondent would further show unto the Court that, since the purchase of the property of the North Western Virginia Railroad Company on February 15, 1865, which became the Parkersburg Branch Railroad Company, the Baltimore and Ohio Railroad Company has purchased, taken title to and now has and owns, and has so owned and held from the date of the respective deeds below set forth, the following real estate in the corporate limits of the City of Parkersburg, to-wit:

In lots 132 to 139, inclusive, which are asserted to be in Exhibit "L," with the bill, the "Passenger Depot," for which the said Baltimore and Ohio Railroad Company paid cash the sum of \$16,339.00, March 24th, 1865, as appears from a copy of the deed therefor from James Cook, herewith filed as "Exhibit 102," which are now worth \$119,300, at least.

Respondent shows that of the above lots Nos. 132 & 133, which are worth \$27,200.00, have three dwelling- thereon worth \$3,500.00, the whole aggregating \$30,700.00, and that the same are rented out by the said complainants to individuals; that lot No. 134 is vacant and not used for railroad purposes and is of the value of \$13,600.00; and lots Nos. 135, 136, 137, 138 & 139 are used for railroad purposes and are worth \$68,000.00 and have a depot thereon worth \$7,000.00 at least, aggregating \$75,000.00.

[fol. 53] Lot No. 5, which is described in said "Exhibit L", as Lot adjoining Ice factory in Bridge right of way" for which the said Baltimore and Ohio Railroad Company paid \$4,000 cash on April 1, 1865, as appears from certified copies of the two deeds therefor from Jefferson Gibbons and wife, and Chas. Wm. Buehler and wife, respectively, herewith filed as "Exhibit 103 and 104," which is worth \$4,000.00. The same used and occupied by the bridge approach of said complainant. A lot 40 feet by 180 feet, for which the said Baltimore and Ohio Railroad company paid \$1,500.00 cash on the 11th day of January, 1871, as appears from a certified copy of the deed therefor, from Daniel R. Neal, herewith filed as a part hereof, as "Exhibit 105", which is worth \$1,500.00. The same is not used for railroad purposes.

Two lots in Gambrill and Jackson's Addition to the City of Parkersburg, for which the said Baltimore and Ohio Railroad Company paid

\$2,850.00 cash on the 11th day of February, 1873, as appears from a certified copy of the said deed therefor, from James M. Jackson and wife herewith filed as a part hereof as "Exhibit 106", which are worth \$2,850.00. The same are vacant and not used for railroad purposes.

Four and three-fourths acres of land, for which the said Baltimore and Ohio Railroad Company paid \$13,500.00 cash on the 29th day of December, 1874, as appears from a certified copy of said deed therefor, from John J. Jackson, Jr., and wife, wherewith filed as a part hereof as Exhibit 107", which is worth \$13,500.00. The same is not used for railroad purposes, but is rented out for lumber yards &c.

A lot 150 feet by 40 feet, which was very valuable, as appears from a certified copy of the said deed therefor from W. A. Tefft and wife and G. W. Hutchinson and wife, dated August 4, 1884, herewith filed as part hereof, as "Exhibit 108", which is worth \$—.

Respondent therefore alleges that the said Exhibit "L" is false and misleading and that the same neither correctly states the ownership of the property therein set forth, or the total amount of property owned by the said complainant in the said city limits, but purposely confuses the property of complainant with that of the Parkersburg Branch Railroad Company.

Respondent avers upon information and belief, that the whole of [fol. 54] the foregoing property in the foregoing deed described, is the property of the Baltimore and Ohio Railroad Company, and not the property of the Parkersburg Branch Railroad Company, and that said Parkersburg Branch Railroad Company owns no property except what is acquired from the North Western Virginia Railroad Company.

Respondent says, that all of complainant's property is subject to taxation and that no taxes thereon have been paid to respondent except upon that part of complainant's bridge across the Ohio River in said city, excluding the approach thereto.

Respondent says, as appears from the ordinances of 1865 and 1867, it granted the franchise and privileges to the Parkersburg Branch Railroad Company to use and occupy Washington, now Sixth street, with its tracks, trestles and piers from Avery street in said City to the Ohio river, but the fact is that complainant so occupies the said street with its trestles, piers, tracks, as an approach to its said bridge, and that the same is the property of complainant and its of great value, to-wit, \$200,000.00 at the least and that no taxes thereon are paid to respondent by complainant or any other person, as respondent is informed and believes.

Respondent here refers to as a part hereof, a mortgage made by said Parkersburg Branch Railroad Company to T. Harrison Garrett, and others, dated July 1, 1879, and a mortgage made by the said Baltimore and Ohio Railroad Company to Merchantile Trust & Deposit Company of Baltimore, dated December 19, 1887, certified copies of which are herewith filed as Exhibits 109 and 110, respectively, showing exhibit "L" with the bill to be false and untrue.

Respondent further says that the Baltimore and Ohio Railroad Company owns in the City of Parkersburg, and has owned for several

years upon the real estate above set forth no inconsiderable amount of side tracks, turn-outs and switches of about 1,215 feet in length; that the Parkersburg Branch Railroad Company owns in the limits of the said city 53,000 feet of track, of which only 20,400 is in the limits of the town of Parkersburg as they were in 1855.

Respondent further shows that the greater part of the property of the Parkersburg Branch Railroad Company, in the present limits of [fol. 55] said city, is situate, outside of the limits of the Town of Parkersburg, as they were in 1855 or 1865.

Respondent charges upon information and belief, that the Parkersburg Branch Railroad Company has owned no rolling stock whatever but that an immense rolling stock used on the tracks of the Parkersburg Branch Railroad Company is, and has been the property of complainant; that complainant owns a large amount of personal property, machinery, fixtures, buildings and appendages in said city and county of Wood.

Further answering, respondent says that the Baltimore and Ohio Railroad Company has made no return to the Auditor of the State, as required by the aforesaid section 67 of its property in Wood County, West Virginia, except of its said bridge, excluding the approach aforesaid, and has paid no taxes upon its said property to said Auditor for respondent or to respondent, as it is informed and believes, not even upon the two engines alleged to be of the value of \$20,000.00, which the sheriff of Wood County has levied upon at the direction of John A. Hutchinson, Esq., chief counsel of complainant in West Virginia, to satisfy taxes for the year 1893, assessed upon property returned to the said Auditor as the property of the Parkersburg Branch Railroad Company.

Respondent says that for many years past, excepting from the year 1892, the Parkersburg Branch Railroad Company, under the cover of said supposed and illegal exemption has paid no taxes to or for respondent's benefit, by reason of the illegal neglect and failure of the officers of respondent and State of West Virginia to enforce the collection thereof; and charges that complainant cunningly and craftily pretending that all of the property aforesaid was the property of the Parkersburg Branch Railroad Company, in order to evade assessment and payment of taxes to respondent upon its property, has fraudulently and willfully returned a part of its property to said Auditor as the property of the Parkersburg Branch Railroad Company in order to screen it behind the said exemption so illegally claimed by the Parkersburg Branch Railroad Company, and thereby escape the payment of taxes to respondent, but in truth a large part of the \$1,042.73, assessed as taxes was so assessed upon the property [fol. 56] of complainant and never owned by the Parkersburg Branch R. R. Co. or the North Western Virginia R. R. Co.

Further answering, respondent says that it has endeavored to obtain from the Secretary of State and Sec-tary of the Board of Public Works of West Virginia, the return of the property made by the Parkersburg Branch Railroad Company and the Baltimore and Ohio Railroad Company, respectively, of the respective properties so far as the same may be applicable to this respondent, but has been

unable so to do, the said officer feeling constrained to refuse such information to respondent.

Respondent further says that, as it is informed and believes, the Parkersburg Branch Railroad Company is by virtue of a lease or contract operated by the Baltimore and Ohio Railroad Company, which lease or contract was made by and at the instance of the complainant, it being the chief stockholder in said Parkersburg Branch Railroad Company and thereby controlling the same throughout every department, and that by the terms of said lease or contract the said Baltimore & Ohio Railroad Company is bound to pay the taxes due upon the said Parkersburg Branch Railroad. And respondent repudiates and denies the insinuation in the said bill contained that complainant is compelled to pay said taxes by reason of its purchase of the property of the North Western Virginia Railroad.

Respondent denies that the sum of \$1,042.73 assessed as taxes for the year 1893 for the benefit of respondent, and which the sheriff of Wood County, West Virginia, has, under the direction of the Auditor of the State of West Virginia, levied upon the property of said plaintiff, were wholly assessed against the property which the officers of the Town of Parkersburg and the North Western Virginia Railroad Company, attempted to exempt from taxation under the deed and contract of June 8, 1855, of which the officers of the said City of Parkersburg and the said Parkersburg Branch Railroad Company attempted to exempt under the several ordinances aforesaid, passed as aforesaid in 1865, 1867 and 1870, respectively, but upon information and belief, charged that said amount is partly for taxes assessed upon property of the Baltimore and Ohio Railroad Company, which was in no wise attempted to be exempted by said ordinances, deed and contract, and which the said Baltimore and Ohio Railroad [fol. 57] Company has fraudulently, as aforesaid, caused to be returned to the Auditor of the State of West Virginia as the property of the Parkersburg Branch Railroad Company.

Respondent denies that it is not entitled to have the benefit of the said sum of \$1,042.73, together with the penalty thereon of 10% for the non-payment thereof within the time prescribed by law, and denies that the same was illegally imposed; that the said sheriff is not legally entitled to collect the same.

Respondent denies that it has violated any agreement or stipulation in this behalf, that it is in bad faith, unjust, inequitable or fraudulent on its part to repudiate the void and fraudulent attempts aforesaid to exempt from taxation the property aforesaid.

Respondent denies that the plaintiff is entitled to any relief whatever by its bill herein sought.

Respondent denies that it has had the use of any of the property of said plaintiff, or received any rents, issues and profits therefrom, except the said \$7,500.00 aforesaid, which was given it by the Parkersburg Branch Railroad Company for said illegal exemption and commutation and other considerations which were valuable and not illegal, which said sum has more than three times been refunded to the said plaintiff and said Parkersburg Branch Railroad Company in the manner set forth.

Respondent would further show unto the Court that heretofore the said Baltimore and Ohio Railroad Company in recognition of its liability to pay taxes upon the property which it owned in the City of Parkersburg, has paid into the State Treasury as required by law, for about ten years taxes upon its bridge, exclusive of the approach thereto, as respondent is informed, which was within the limits of the City of Parkersburg, and has also paid to the City assessments for street paving and sewerage, even upon the real property which respondent has hereinbefore alleged was returned to the State Auditor as the property of the Parkersburg Branch Railroad Company and for a part of which the taxes now so sought to be enjoined were assessed, and that for the year 1892 for the time foregoing its conscienceless and fraudulent conduct, the said Baltimore and Ohio Railroad Company paid the whole of the tax for the year 1892, which were assessed in favor of this respondent, and respondent [fol. 58] ent denies it is estopped by the failure of its officers to either assess or collect the taxes which were legally assessable upon the property of the said Parkersburg Branch Railroad Company and the property of the said Baltimore and Ohio Railroad Company, when it had the power to assess and collect the same, and by the failure of the State authorities to assess and collect said legally assessable taxes for the benefit of respondent, from now claiming the right to have and receive, and of receiving and having the taxes so assessed and collected by said State authorities for the benefit of respondent, or that may be now or hereafter assessed and collected.

Respondent would further show that the sovereign power of taxation is a continuing power and that the right to have the benefit of the taxes assessable by the Board of Public Works and the Auditor of the State of West Virginia, is one that continues from year to year, against complainant and the Parkersburg Branch Railroad Company, and that such right to respondent is of great value, to-wit: of more than \$20,000.00 and that respondent would be deprived of said amount, and more, in case said right of receiving said taxes so assessed and collected by the State authorities of the State of West Virginia were denied to it.

Respondent now having fully answered, prays to be hence dismissed with its reasonable costs in this behalf expended. And it will ever pray &c.

In witness whereof the City of Parkersburg has caused its corporate seal to be affixed, and its corporate name to be signed, hereunto by W. H. Smith, Jr., its Mayor.

The City of Parkersburg, by W. H. Smith, Jr., Mayor. John F. Laird, Smith D. Turner, Solicitors.

Jurat showing the foregoing was duly sworn to by W. H. Smith, Jr., omitted in printing.

[fol. 59] EXHIBIT 100 FILED WITH THE ANSWER OF THE CITY OF PARKERSBURG—Filed June 14, 1894

This deed made this third day of April, eighteen hundred and sixty-five, between the Mayor and City Council of Baltimore of the first part, and the Baltimore and Ohio Railroad Company of the second part. Whereas, by a deed of trust from the North Western Virginia Railroad Company to the said Mayor and City Council of Baltimore, dated on the twenty-first day of March, in the year eighteen hundred and fifty-three, the said North Western Virginia Railroad Company in consideration of the guarantee by the said Mayor and City Council of the bonds or certificate of loan of the said North Western Virginia Railroad Company, as fully set forth in the recitals of the said deed of trust, and under the authority therein referred to, did grant unto the said Mayor and City Council, all the property of the said North Western Virginia Railroad Company, of whatever kind, nature and description the same might be, as well that which they at that time actually held, as that which in the prosecution, completion, stocking and working of the said railroad should accumulate therein; In trust to secure the payment of the bonds or certificate of loan, with the interest thereon according to their tenor; as described in the recitals of the deed of trust afore-[fol. 60] said, to the end that the said Mayor and City Council might be saved harmless and indemnified from all loss and injury consequent in any manner upon the guarantee aforesaid—and whereas the said North Western Virginia Railroad Company having failed to pay the interest on the bonds or certificates of loan aforesaid, to the holders thereof according to their tenor, the said Mayor and City Council paid the same as they fell due to the holders aforesaid, that is to say, from the semi-annual payment due on the first day of July, eighteen hundred and sixty-one, to the thirty-first day of December, eighteen hundred and sixty-four, both inclusive, in consequence of which failure of the said North Western Virginia Railroad Company and consequent payment by the said Mayor and City Council of Baltimore, the latter became substituted in the place of the holders of the said bonds or certificates of loan to the extent of the interest paid as aforesaid, amounting to the sum of three hundred and fifteen thousand dollars, as also to the extent of any other arrears of interest on the account aforesaid, paid by the said Mayor and City Council of Baltimore, and whereas, the said Mayor and City Council did, on the twenty-eighth day of July, in the year eighteen hundred and sixty-four by deed duly executed, and for the consideration therein mentioned assign among other things to the said Baltimore and Ohio Railroad Company all the claim so acquired by the said Mayor and City Council, growing out of the non-payment of the interest aforesaid by the said North Western Virginia Railroad Company, and the payment thereof by the said Mayor and City Council as aforesaid, as will appear by reference to the said deed, recorded in the several counties, through which the said North Western Virginia Railroad passes, so that the said Baltimore and Ohio Railroad Company became substituted in the place of the holders of

the said bonds or certificates of loan as regarded the unpaid interest aforesaid, and whereas, the said Baltimore and Ohio Railroad Company, having required the said Mayor and City Council, Trustee as aforesaid, after the interest aforesaid became due and after default was made in the payment thereof and after the said Baltimore and Ohio Railroad Company had become substituted as aforesaid to sell the property so as aforesaid, conveyed by the deed of trust first aforesaid, [fol. 61] said, and whereas the said Mayor and City Council, Trustee as aforesaid, having first given reasonable notice of the time and place of sale by advertisement for more than thirty days in the National Telegraph published at Clarksburg, in the State of West Virginia, in the Ritchie Press published at Harrisville, in the State of West Virginia, in the Parkersburg Gazette, published at Parkersburg, in the State of West Virginia, and in the Baltimore American, published in Baltimore, in the State of Maryland, did proceed to sell at public auction for cash at the hour of noon on the fifteenth day of February, in the year eighteen hundred and sixty-five, before the front door of the Court House of Woods County, in the town or city of Parkersburg, in said county, all the property of the said North Western Virginia railroad company, of every kind, nature and description at the time of the said sale (the sale of the whole being necessary, because of the indivisibility thereof), and whereas, at the said time and place the said Baltimore and Ohio Railroad Company bid the sum of thirty-two thousand dollars for the property, so as aforesaid offered for sale, which was the highest bid therefor, and have since paid the said sum and thereby became entitled to a conveyance of the said property, wherefore these presents are executed. Now this deed witnesseth that in consideration of the premises, and of the payment of the sum last aforesaid, the said Mayor and City Council of Baltimore, Trustee as aforesaid, do grant unto the Baltimore and Ohio Railroad Company, with special warranty all the property of the North Western Virginia Railroad Company of every kind and description, as well as that held by the said company at the date of the deed of trust aforesaid, as that which in the prosecution, completion, stocking and working of said railroad has been accumulated thereon. To have and to hold the work and property hereby granted and conveyed unto the said Baltimore and Ohio Railroad Company. In trust for the Baltimore and Ohio Railroad Company and the bondholders, creditors and stockholders of the North Western Virginia Railroad Company, assenting to the terms set forth in certain "proportions to constitute the basis of an agreement between the Baltimore and Ohio and the North Western Virginia Companies", bearing date on the twenty-second day of July, in the year eighteen hundred and sixty-four, authenticated by the signatures [fol. 62] of the Presidents of the said companies and by the corporate seals thereof, which said propositions are referred to in, and are made part of a certain agreement, between the Mayor and City Council of Baltimore and the Baltimore and Ohio Railroad Company, bearing the date on the twenty-first day of July, eighteen hundred and sixty-four. And the said Baltimore and Ohio Railroad Company purchased as aforesaid, and Trustee as hereinbefore

referred to, being by force of the twenty-eighth section of the sixty-first chapter of the Eighteenth title of the law of Virginia, secured, written, published, pursuant to law" in eighteen hundred and sixty and now the law of West Virginia, a corporation by any name that may be set forth in this conveyance, does hereby declare that its said corporate name as such purchaser and Trustee is "The Parkersburg Branch Railroad Company", and it is hereby declared to be the intent of this conveyance to give to the said purchaser by the said title of "The Parkersburg Branch Railroad Company", all the rights and to subject it to all the obligations, which are described in the twenty-eighth and twenty-ninth sections of the sixty-first chapter of the eighteenth title of the law of Virginia, secured, written, published pursuant to law in the year eighteen hundred and sixty. Witness the signature of the Mayor of the said city and the seal of the Mayor and City Council of Baltimore on the day and year first above written.

John Lee Chapman, Mayor. (City of Baltimore.)

STATE OF MARYLAND,

City of Baltimore, To-wit:

On this third day of April, in the year eighteen hundred and sixty-five, before the subscriber, a Notary Public of said State, in and for the said City, duly commissioned and sworn, personally appeared John Lee Chapman, Esquire, Mayor of the said City, whose name is signed to the writing above, bearing date on the third day of April, in the year eighteen hundred and sixty-five, and acknowledged the same to be the act of the Mayor and City Council of Baltimore.

In testimony whereof I do hereto set my hand and affix my seal [fol. 63] Notarial, the day and year herein first above written.

T. R. Rich, Notary Public. (Thomas R. Rich, Notary Public, Baltimore, Md.)

WEST VIRGINIA:

Recorder's Office, Wood County, 8th April, 1865

The foregoing writing duly stamped and acknowledged, was this day received in said office, and together with certificate of said acknowledgment thereto annexed, admitted to record therein.

Teste: G. K. Leonard, C. M. C.

A copy from Deed Book No. 24, page 189. Teste: B. F. Stewart, C. M. C.

EXHIBIT 101 WITH ANSWER OF THE CITY OF PARKERSBURG—Filed
June 14, 1894An Ordinance Authorizing the Extension of the Parkersburg Branch
Railroad Through the City to the Ohio River

Passed May 30, 1865

Be it ordained by the Mayor and Council of the City of Parkersburg:

Sec. 1. That the Parkersburg Branch Railroad Company, late the North Western Virginia Railroad Company, are hereby authorized and empowered to construct, extend and continue their railroad, with a double track, and the necessary sidings, switches, embankments, piers, pillars, abutments, and appurtenances from their property on the southerly side of Green street, along Washington [fol. 64] street, to or near the site of the railroad bridge, proposed to be built across the Ohio river, at or near the foot of Washington street, in the city of Parkersburg; the said extension to be constructed in accordance with the plan and profile thereof furnished by J. L. Randolph, Esq., Civil Engineer, now on file in the office of the Mayor of said city, and verified by his signature, unless a departure therefrom is hereafter authorized by an ordinance of the said Mayor and Council, except that there shall be no pillar or pier on the line of any street, except Washington street; and wherever the tract or bed of the said extension is elevated above the surface of any street, it shall be so constructed that no water, cinder, rubbish or other substance can fall from the same, and any person who may throw or cast, or wilfully or carelessly permit to fall from such elevated track or bed, any substance whatever, shall be liable to a fine not exceeding twenty dollars for each and every distinct offense, to be recovered as other fines and penalties are recoverable.

Sec. 2. Permission is hereby given to the said Parkersburg Branch Railroad Company to close and appropriate to their exclusive use and control, so much of the alley known as St. Cloud Court lying between Green and Avery Streets, as extends from Washington to Littleton street so long as they continue to use the square bounded by the said four streets for depot, station, or other purposes connected with the business of their railroad. And the said railroad company are hereby further authorized and empowered to lay and construct as many tracks of rails, switches and turnouts along and across Green and Washington streets, at and near the intersection of the said streets, as they may deem necessary or desirable for more conveniently entering and departing from the said square with their engines, cars and other rolling stock.

Sec. 3. Permission is hereby further given to the said company to use steam or other power for drawing or propelling their cars and trains over *ant* railroad track, the construction and use whereof is

authorized or intended to be authorized by this or any future ordinance, subject as to such construction and use to all the provisions [fol. 65] and restrictions, so far as applicable of an ordinance of the President, Recorder and Trustees of the town of Parkersburg, entitled "An ordinance to permit the North Western Virginia Railroad Company to lay rails along certain streets of the town, and for other purposes" passed October 25, 1852, which, together with the deed of conveyance and agreement between the said President, Recorder and Trustees, and the said North Western Virginia Railroad Company, bearing date on the 8th day of June, in the year one thousand eight hundred and fifty-five, and of record in the county of Wood, and State of West Virginia, and all other ordinances and parts of ordinances heretofore passed by the said town, and accepted by the Northwestern Virginia Railroad Company, and not repealed are hereby declared to be in full force and binding on the City of Parkersburg, and the said Parkersburg Branch Railroad company as the successors, respectively, of the former parties thereto.

Sec. 4. The permissions and privileges granted by this ordinance are granted upon these conditions and not otherwise, namely: That if the Mayor and Council of the City of Parkersburg, shall, at any time hereafter, ordain and direct the widening of Washington street aforesaid, from Green street to the Ohio River, to the width of not more than eighty feet from side to side, including sidewalks, the said Parkersburg Branch Railroad Company shall reimburse and pay to the said City, whenever legally demanded, all damages and costs which shall have been paid by, or awarded against the said City, according to law, for injuries to the adjoining property occasioned by such widening for the intended purpose, and for the price of the land taken for such widening and the improvement thereon; and further, that the said Parkersburg Branch Railroad Company will, without unnecessary delay, proceed to the constructions of the wharf at the foot of Court street, in said city as provided in the deed of conveyance and agreement hereinbefore referred to, and complete the same at their own costs and charges within two years from the 1st of March, 1865; the said wharf to have the same gradients, and to extend as from the outer line of Ohio street into the river, as the wharf recently constructed by the said city between Kanawha and Neal [fol. 66] streets, and when completed, to be the property of the said City and under the exclusive care and control of the said Mayor and Council.

Sec. 5. This ordinance shall be in force whenever the said Parkersburg Branch Railroad Company shall signify their acceptance of the same and their agreement to the terms, provisions, conditions and stipulations thereof, by a suitable instrument of writing under their seal and the signature of their President.

Sec. 5. An ordinance entitled "an ordinance granting certain privileges to the Northwestern Virginia Railroad Company, their assigns &c.," passed February 4, 1865, is hereby repealed.

The foregoing is a true copy of an ordinance passed on May 30, 1865, by the Mayor and Council of the City of Parkersburg.

In witness whereof I have hereunto placed my signature and the seal of the said City of Parkersburg.

W. H. Smith, Jr., Mayor.

EXHIBIT 102 FILED WITH ANSWER OF THE CITY OF PARKERSBURG
—Filed June 14, 1894

This deed made this 24th day of March, 1865, between James Cook of the County of Wood and State of West Virginia of the first part and the Baltimore and Ohio Railroad Company of the other part. Whereas, the North Western Virginia Railroad Company by a certain deed bearing date the 21st day of December in the year 1857, and of record in the Recorder's office of Wood County in Book No. 19, pages 158 and 159, did grant unto the said James Cook (among other things) all those eight several in lots, situated in the town (now city) of Parkersburg, in said County of Wood on Avery and Green streets, between Washington and Littleton streets, and known and numbered on the plat of said City as in lots numbers 132, 133, 134, 135, 136, 137, 138 and 139 (one hundred and thirty-two [fol. 67] to one hundred and thirty-nine, inclusive). In trust to secure J. M. Stephenson and others named in said deed a sum of money therein fully set forth. Now this deed witnesseth that the said James Cook in performance of his duties, as Trustee, and for and in consideration of sixteen thousand three hundred and thirty-nine dollars, to him in hand paid by the said Baltimore and Ohio Railroad Company, the receipt whereof is hereby acknowledged, doth grant unto the said Baltimore and Ohio Railroad Company, with special warranty, the eight in lots above named, numbered and described, lying and being in the City of Parkersburg, County of Wood and State of West Virginia, to have and to hold unto the said company or its assigns forever.

Witness the following signatures and seal.

James Cook. (Seal.)

STATE OF WEST VIRGINIA,
County of Wood:

I, A. M. Moss, a Notary Public in and for the State of West Virginia, in the County of Wood, do certify that James Cook, whose name is signed to the foregoing writing bearing date the 24th day of March, 1865, personally appeared before me in my State and County aforesaid and acknowledged the same.

Given under my hand this 26th day of March, 1865.

A. M. Moss, Notary Public.

WEST VIRGINIA:

Recorder's Office, Wood County, 30th March, 1865

The foregoing writing duly stamped and acknowledged was this day received in said office, and together with the certificate annexed, admitted to record therein.

Teste: G. K. Leonard, R. W. C.

A copy from Deed Book No. 24, page 185. Teste: B. F. Stewart, C. M. C..

[fol. 68] EXHIBIT 103 FILED WITH ANSWER OF THE CITY OF PARKERSBURG—Filed June 14, 1894

This deed made this first day of April, 1865, between Charles Wm. Buhler and Doratha Buhler, his wife, of the City of Parkersburg, in the State of West Virginia, of the one part, and the Baltimore and Ohio Railroad of the other part.

Witnesseth that for an- in consideration of the sum of two thousand dollars in hand paid, the receipt whereof is hereby acknowledged, the said parties of the first part do hereby grant, bargain and sell, unto the said Baltimore and Ohio Railroad Company, all that certain part out of lot No. 5 in the said City of Parkersburg, and bounded as follows, to-wit: Beginning at a point, Ohio street, thirty-three feet from the intersection of Washington street, thence down Ohio street, forty nine feet to a stake, thence at right angles and towards Ann street one hundred and seventy feet to a stake, thence at right angles and towards Washington street forty nine feet to a stake, thence at right angles and towards Ohio street one hundred and sixty-five feet to the beginning, and being the same property with the appurtenances conveyed to said Charles W. Buhler by F. E. Davidson and wife by deed bearing date on the 18th day of September, 1863, and adjoining a lot of J. Gibbons and others. To have and to hold the said real estate with the appurtenances to the said Baltimore and Ohio Railroad Company forever, and the said parties of the first part hereby covenant with said party of the second part, that they will warrant generally the property herein conveyed to the party of the second part and its assigns. In testimony whereof the said parties of the first part have set their hands and seals.

Ch. W. Buhler. (Seal.) Dorothea Buhler. (Seal.)

W. VA.:

Recorder's Office, Wood County, 1st April, 1865

I, G. K. Leonard, Recorder for said County, do certify that C. W. [fol. 69] Buhler, whose name is signed to the foregoing writing bearing date on the first of April, 1865, has acknowledged the same before me in my office, and I further certify that Dorothea Buhler, wife of

the said Ch. W. Buhler, whose names are signed to the aforesaid writing, personally appeared before me in the said office on the 6th of April, 1865, and being examined by me separate and apart from her said husband, she, the said Dorothea Buhler, acknowledged the same to be her free act and deed, and said she was still satisfied therewith, and did not wish to retract it.

Given under my hand this 6th day of April, 1865, and the said writing being duly stamped is admitted to record, the day and year last aforesaid.

G. K. Leonard, R. W. C.

A copy from Deed Book No. 24, page 230. Teste: B. F. Stewart, C. M. C.

EXHIBIT 104 FILED WITH ANSWER OF THE CITY OF PARKERSBURG—
Filed June 14, 1894

This deed made this first day of April, in the year 1865, between Jefferson Gibbens and Hannah, his wife, of the City of Parkersburg, in the State of West Virginia, of the one part and the Baltimore and Ohio Railroad Company, of the second part, witnesseth, that the said parties of the first part and in consideration of the sum of two thousand dollars in hand paid, the receipt whereof is hereby acknowledged, have and by these presents do grant, bargain and sell unto the said Baltimore and Ohio Railroad Company, all that certain lot and parcel of land, situate in the said City of Parkersburg, with the appurtenances on Ohio street between Washington and Littleton streets and being a part out of lot No. 5, and bounded as follows: beginning sixty six feet from the junction of Washington and Ohio streets and running Ohio street seventy feet, thence towards Pond Run (parallel with Washington street) one hundred and seventy feet to a ctake [fol. 70] on a line parallel with Ohio street to Chas. W. Buhler's home line, thence with the same to the beginning. This being a sale in gross and no guarantee being given as to the precise quantity of land, or as to the strict accuracy of boundaries. But this conveyance embraces all the lot at the place described owned by said Gibbens and no more. To have and to hold the said real estate with the appurtenances to the said Baltimore and Ohio Railroad Company forever, and the said parties of the first part hereby covenant with the party of the second part that they will warrant generally the property herein conveyed to the party of the second part and its assigns.

In testimony whereof the parties of the first part have hereunto set their hands and seals.

Jefferson Gibbens. (Seal.) Hannah Gibbens. (Seal.)

WEST VIRGINIA:

Recorder's Office, Wood County, 1st April, 1865

I, G. K. Leonard, Recorder for Wood County, do certify that Jefferson Gibbens, whose name is signed to the foregoing writing bearing date on the 1st day of April, 1865, has acknowledged the same before me in my office.

And I further certify that Hannah Gibbens, wife of the said Jefferson Gibbens, whose names are signed to the aforesaid writing, personally appeared before me, and being examined by me separate and apart from her said husband, declared that she voluntarily executed the same and does not wish to retract it.

Given under my hand the 1st day of April, 1865, and the said writing being duly stamped is admitted to record the day and year last aforesaid.

G. K. Leonard, R. W. C.

A copy from Deed Book No. 24, page 232. Teste: B. F. Stewart, C. M. C.

[fol. 71] EXHIBIT 105 FILED WITH ANSWER OF THE CITY OF PARKERSBURG—Filed June 14, 1894

This deed made the 11th day of January, 1871, between Daniel R. Neal, of the County of Wood and the State of West Virginia, of the first part, and the Baltimore and Ohio Railroad Company of the second part; Witnesseth: That for and in consideration of fifteen hundred dollars, the receipt whereof is hereby acknowledged, said party of the first part doth grant, bargain, sell and convey unto the said Baltimore and Ohio Railroad Company, the following described property, to-wit:

All of that tract or lot of land lying and being in the City of Parkersburg, County and State aforesaid, bounded as follows: Beginning on the southwest side of Washington street, at the north corner of a lot now owned by John Burns and running thence with his line towards Littleton street, one hundred and eighty feet, thence at right angles towards the Ohio river forty feet, thence at right angles and parallel with the first line one hundred and eighty feet to Washington street; thence with said street forty feet to the beginning. To have and to hold the same unto said Baltimore and Ohio Railroad Company and assigns for ever, with covenants of general warranty, together with all the appurtenances thereto belonging.

Witness the following signature and seal.

D. R. Neal. (Seal.)

COUNTY OF WOOD,
State of West Virginia, To-wit:

I, W. H. Smith, recorder for the County and State aforesaid, do certify that Daniel R. Neal, whose name is signed to the writing above, bearing date on the 11th day of January, 1871, personally appeared before me on the 11th day of January, 1871, and acknowledged the same as his act and deed.

[fol. 72] Given under my hand this 11th day of January, 1871.
Teste: W. H. Smith, R. W. C.

W. V. A.:

Recorder's Office, Wood County, January 12, 1871

The foregoing writing duly stamped and acknowledged was this day admitted to record.

Teste: W. H. Smith, R. W. C.

A copy from Deed Book No. 31, page 371. Teste: B. F. Stewart,
C. M. C.

EXHIBIT 106, FILED WITH ANSWER OF THE CITY OF PARKERSBURG—
Filed June 14, 1894

This deed made this 11th day of February, A. D. 1873, between James F. Jackson and Lucy F. Jackson, his wife, of the first part, and the Baltimore and Ohio Railroad Company of the second part, witnesseth, that the parties of the first part, for and in consideration of the sum of twenty eight hundred and fifty dollars to them in hand paid by the said Baltimore and Ohio Railroad Company, the receipt of which is hereby acknowledged, have granted, bargained and sold, and by these presents do hereby grant, bargain, sell and convey unto the said Baltimore and Ohio Railroad Company, with covenants of special warranty, all of the following described lots or pieces of land situate in the city of Parkersburg, the first of which is described as follows, to-wit: Beginning at the corner of Washington and Monroe streets, in said city, twenty feet from the present line of said Washington street, and at the point where said corner will be, after deducting the twenty feet proposed to be taken by said city for the widening of said Washington street, and running thence with said Monroe street ninety feet to a point, thence at right angles to said Monroe street towards Ann street fifty feet to a point and corner to a lot conveyed to said Jackson by P. D. Gambrill [fol. 73] and wife, &c., known as lot No. 8 in the plat of the addition to said city by Gambrill and Jackson, thence with a line of lot No. 8 towards said Washington street ninety feet to a point twenty feet distant from the present line of said Washington street, and in a line in the proposed addition to said street, and thence fifty feet to the beginning, it being the whole of lot No. 9 on the plat of

said Gambrill and Jackson conveyed to the said city of Parkersburg by James Malone on the 17th day of August, 1870, excepting from the same fifty feet front by twenty feet deep, which is retained by the city for the purpose of widening said Washington street, and being the same lot conveyed by W. J. Hill, Mayor of said city, to James M. Jackson by deed dated the 5th day of September, A. D. 1870, and the second lot or piece of land hereby conveyed is bounded and described as follows, to-wit:—that piece or parcel of ground situate on Washington street in the city of Parkersburg, and being part of what is known and designated on the plat of Gambrill and Jackson addition to the city of Parkersburg as lot No. 8, adjoining the lot above described, and being all of said lot No. 8, saving and excepting therefrom fifty feet front on Washington street by twenty feet deep, which is reserved by said city for the purpose of widening said Washington street, and being the same property conveyed by P. D. Gambrill and wife and Hannah R. Kinche-loe to the said Jas. M. Jackson by deed bearing date on the 23rd day of March, 1870, saving and excepting therefrom the reservation to the city as aforesaid for widening said Washington street, the said fifty front by twenty feet deep. To have and to hold the said two pieces or parcels of land with the appurtenances unto the said Baltimore and Ohio Railroad Company and its assigns forever. Witness the following signatures and seals.

Jas. M. Jackson. (Seal.) Lucy F. Jackson. (Seal.)

Wood County Court Clerk's Office, April 24, 1873

I, Will Hatcher, Clerk of the County Court of Wood Co., W. Va., do certify that James M. Jackson, whose name is signed to the above [fol. 74] writing, bearing date on the 11th day of February, 1873, has this day acknowledged the same before me, and I further certify that Lucy F. Jackson, wife of the said James M. Jackson, whose name is signed to the writing above, bearing date on the 11th day of February, 1873, personally appeared before me in my county aforesaid, and being examined by me privily and apart from her said husband, and having the foregoing writing fully explained to her, acknowledged that she had willingly executed the same, and did not wish to retract it, whereupon the said writing is admitted to record in the Clerk's office aforesaid.

Teste: Will Thatcher, C. M. C.

A copy from Deed Book 33, page 338. Teste: B. F. Stewart, C. M. C.

EXHIBIT 107, FILED WITH ANSWER OF THE CITY OF PARKERSBURG—
Filed June 14, 1894

This deed made this 29th day of December, in the year eighteen hundred and seventy four, between John J. Jackson, Jr., and Caro-

line C. Jackson, his wife, of the city of Parkersburg, County of Wood and State of West Virginia, of the first part, and the Baltimore and Ohio Railroad Company, of the second part, Witnesseth: that in consideration of the sum of thirteen thousand five hundred dollars, in hand paid, the receipt whereof is hereby acknowledged, the said parties of the first part hereby grant and convey unto the said Baltimore and Ohio Railroad Company, the following described real estate in the City of Parkersburg, lying on the south side of Depot street in said city and bounded as follows, to-wit: Fronting on Depot street in the City of Parkersburg, five hundred feet, more or less, and extending to the little Kanawha River and bounding on the south west by property owned by S. P. Wells, and south east by property owned by S. P. Wells, and south east by property owned by the First National Bank, containing $4\frac{3}{4}$ acres, as shown by plat hereto attached and made a part of this conveyance, and being the same land which was conveyed to the said John J. Jackson, Jr. by Jacob B. Jackson, assignee of George A. Welles & Co., [fol. 75] Bankrupts, by the First National Bank, Parkersburg; and by B. H. Latrobe, and the said parties of the first part covenant to warrant generally the premises hereby conveyed.

Witness the following signatures and seals.

J. J. Jackson, Jr. (Seal.) Carrie C. Jackson. (Seal.)

STATE OF WEST VIRGINIA,
Wood County, ss:

I, B. Mason Ambler, a Notary Public of said County, do hereby certify that J. J. Jackson, Jr., and Carrie C. Jackson, his wife, whose names are signed to the writing above, bearing date on the 9th day of December, 1875, have this day acknowledged the same before me in my said County, and I do further certify that Carrie C. Jackson, the said wife of J. J. Jackson, Jr., whose names are signed to said writing, bearing date on the said 29th day of December, 1875, personally appeared before me in the County aforesaid, and being examined by me privily and apart from her husband and having the said writing fully explained to her, she, the said Carrie C. Jackson, acknowledged the said writing to be her act, and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand this 29th day of December, A. D. 1875.

B. Mason Ambler, Notary Public.

Wood County Court Clerk's Office, January 15, 1876

The foregoing writing with the certificate of the acknowledgment and relinquishment of dower and the plat thereto annexed was this day admitted to record in the Clerk's office aforesaid.

Teste: Will Hatcher, C. M. C.

A copy from Deed Book No. 36, page 505. Teste: B. F. Stewart, C. M. C.

[fol. 76] EXHIBIT 108 FILED WITH ANSWER OF THE CITY OF PARKERSBURG--Filed June 14, 1895

This deed made this 4th day of August, in the year eighteen hundred and eighty four, between William A. Tefft and Emma T. Tefft, his wife, of the County of Ross and State of Ohio, and George W. Hutchinson and Betsy Ann Hutchinson, his wife, of the City of Parkersburg, County of Wood and State of West Virginia, of the first part, and the Baltimore and Ohio Railroad Company of the second part.

Whereas, the said parties of the first part on the 1st day of January, 1856, by deed bearing that date, recorded in the Clerk's office of the County Court of Wood County, West Virginia, in deed book No. 18, page 226, conveying to B. H. Latrobe, certain real estate, in said city of Parkersburg, in Tefft and Hutchinson's addition to said city, near to and adjoining the other depot of said company, containing four acres and all poles and in said conveyance in the description thereof; named 71-2/10 poles contained in Washington street, running through said land conveyed as aforesaid, as laid down on a plat of said city drawn by Geo. A. Welles.

And, whereas, afterwards said B. H. Latrobe conveyed to said John J. Jackson, Jr., by deed dated January 4, 1876, recorded on said records in Deed Book No. 36, page 502, reciting a title bond dated June 19, 1873, a certain parcel of said land binding 150 feet on Depot street, and running the same width to the Little Kanawha River, without the reservation being *being* made in said last mentioned deed of any street; and subsequently without any such reservation the said Jackson conveyed to said railroad company by deed recorded on said records in Deed Book No. 36, page 505, the parcel of said land last above described in which rendee the title still remains; and whereas, no dedication of any land has ever been made through said property for the purpose of a street; no conveyance for that purpose has been made and no street has ever been opened across the same, either by way of private lease of the public and the parties of the first part, desiring to quit claim all questions of title or claim of title to such portion of said land as is here-[fol. 77] inafter described, assume to said Railroad company such title as may still remain in them by reason of the reservation in said deed to said B. H. Latrobe. Now this deed witnesseth, that in consideration of the premises and the sum of one dollar in hand paid, the receipt of which is hereby acknowledged, the said parties of the first part do hereby convey, revise, release and forever quit claim unto the said party of the second part, its successors and assigns, all and each of our right, title and interest in that certain piece or parcel of land situate in said City of Parkersburg, south of Depot street in Tefft and Hutchinson's addition, bounded and described as follows: beginning at the southern or south eastern corner of a lot or parcel of land described at lot No. 11, in the plat of B. H. Latrobe, as sub-divided by himself, 200 feet from the southern line of Depot street; thence eastwardly, parallel with the line of

Depot street 150 feet to the line of lot conveyed by John V. Rathbone to Geo. A. Welles and Co. by deed dated February 1, 1866, and recorded in said records in Deed Book No. 31, page 20, thence with said line towards the Little Kanawha River 40 feet; thence at right angles northward 150 feet to the western line of the tract of land sold to Jackson by Latrobe under title, land dated June 19, 1873, and thence with said line towards Depot street 40 feet to the beginning, with all the privileges and appurtenances thereto belonging.

Witness the following signatures and seal-

G. W. Hutchinson (Seal), Betsy Ann Hutchinson (Seal),
W. A. Tefft (Seal), Emma T. Tefft (Seal).

STATE OF WEST VIRGINIA,
County of Wood, ss:

I, W. W. Van Winkle, a Notary Public for the County and State aforesaid, hereby certify that G. W. Hutchinson, whose name is signed to the foregoing writing, bearing date on the 4th of August, 1884, this day personally appeared before me in said County and acknowledged the same. And I do further certify that Betsy Ann [fol. 78] Hutchinson, wife of the said G. W. Hutchinson, whose names are signed to the foregoing writing, bearing date on the 4th day of August, 1884, this day personally appeared before me in said County, and being examined by me privily and apart from her said husband, and having said writing fully explained to her she, the said Betsy Ann Hutchinson, acknowledged the same writing to be her act, and declared that she has willingly executed the same and does not wish to retract it.

Given under my hand this 4th day of August, 1884.

W. W. Van Winkle, Notary Public.

STATE OF OHIO,
Ross County, ss:

I, M. G. Evans, Notary Public for the County and State aforesaid, hereby certify that Wm. A. Tefft, whose name is signed to the foregoing writing, bearing date on the 4th day of August, 1884, this day personally appeared before me in my said County and acknowledged the same, and I do further certify that Emma T. Tefft, wife of the said Wm. A. Tefft, whose names are signed to the foregoing writing, bearing date in the 4th day of August, 1884, this day personally appeared before me in said County, and being examined by me privily and apart from her said husband, and having said writing fully explained to her, she, the said Emma T. Tefft, acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

In testimony whereof, I hereunto set my hand and affixed my notarial seal this 5th day of August, 1884.

M. G. Evans, Notary Public within and for Ross County,
Ohio. (Seal.)

STATE OF WEST VIRGINIA:

Wood County Clerk's Office, Aug. 6, 1884

The foregoing writing bearing date August 4, 1884 with annexed [fol. 79] certificate, was this day recorded in said office.

Teste: W. H. Smith, C. M. C.

A copy from Deed Book No. 50, page 302. Teste: B. F. Stewart, C. M. C.

EXHIBIT 109 FILED WITH THE ANSWER OF THE CITY OF PARKERSBURG—Filed June 14, 1894

This indenture, made the first of July, eighteen hundred and seventy nine, between the Parkersburg Branch Railroad Company, a corporation organized under the laws of the State of West Virginia, as the party of the first part, and T. Harrison Garrett, William F. Burns and John Gugg, of the City of Baltimore, and State of Maryland, Trustees, for the uses and purposes and upon the terms and conditions hereinafter stated, parties of the second part; Whereas the parties of the first part in pursuance of the authority conferred upon it, and the North Western Virginia Railroad Company by the laws of the states of Virginia and West Virginia, has constructed and now has in use and operation a railroad from Grafton, in Taylor County, State of West Virginia, to Parkersburg, Wood County, in said State.

And whereas, the party of the first part is authorized by law to execute trust mortgages of its railroad and the franchises and appurtenances connected therewith, and of its other property, real, personal and mixed to secure the payment of the bonds or certificates of indebtedness issued for the objects and purposes hereinafter set forth, and whereas the President and Directors of the party of the first part, at a meeting duly called and held on the tenth day of June, eighteen hundred and seventy nine, at the office of the party of the first part in the City of Parkersburg, Wood County, West Virginia, adopted by the unanimous vote of said directors, a majority of whom were present at the said meeting, a preamble and certain resolutions in the words following:

Whereas, this company has still an outstanding indebtedness due [fol. 80] by it for moneys expended on the construction and equipment of its road, in operating the same, and in carrying out the objects of the act of the Legislature of Virginia, passed February fourteenth eighteen hundred and fifty one, incorporating the North Western Virginia Railroad Company, to whose rights, property and franchises the Parkersburg Branch Railroad Company has succeeded. And whereas, it is described to borrow money to pay off and discharge such indebtedness and to furnish the means to complete, equip and improve the railroad of this company.

Therefore, resolved, that for the purpose of paying such indebtedness and completing and perfecting its line of road and making other improvements connected therewith and providing for paying the cost of such further construction and equipment and furnishing the means required to provide the additional facilities demanded by the increase of business of the company, this Company do issue its bonds to the amount of three million dollars in sums of ten thousand dollars each, bearing interest from the first day of July, 1879, and payable on the first day of April, nineteen hundred and nineteen, at the office of the Treasurer of the Baltimore and Ohio Railroad Company in the city of Baltimore, State of Maryland, with interest thereon in the meantime at the rate of six per cent per annum, payable semi-annual- on the first days of October and April in each year, at the said office of the Treasurer of the Baltimore and Ohio Railroad Company on presentation and surrender of the coupons for such interest, which shall be annexed to such bonds (but the first interest coupon shall be for three months from July first, eighteen hundred and seventy nine) and that the railroad of this company from the southeast side of any street in the City of Parkersburg, in Wood County, West Virginia, to its terminus at Grafton, in Taylor County, West Virginia, being one hundred and four miles long and including the branch in the said city of Parkersburg, leading to the freight depot on Kanawha street, therein, together with the franchise and appurtenances connected therewith, and all its property, real, personal and mixed, and therewith, or which may be hereafter acquired for use in connection with said road, shall be and are hereby pledged for the payment of the principal and interest of said bonds to be issued. Resolved—

[fol. 81] That the form of the bond and coupon so to be issued shall be as follows:

Form of Bond

United States of America, State of West Virginia

No.—

10,000.

The Parkersburg Branch Railroad Company

First Mortgage Loan of 1879

This is to certify that the Parkersburg Branch Railroad Company, a corporation of the State of West Virginia, is indebted to the bearer in the sum of ten thousand dollars, which it promises to pay on the first day of April, nineteen hundred and nineteen, at the office of the Treasurer of the Baltimore and Ohio Railroad Company, in the city of Baltimore, State of Maryland, on the surrender of this bond, with interest thereon in the meantime from the first day of July, eighteen hundred and seventy nine, at the rate of six per cent per annum, payable at the same place on the first day of October and April of each year on the presentation and surrender

of the annexed coupons therefrom. This bond is one of a series of bonds, each for ten thousand dollars, amounting in the aggregate to three million dollars, numbered from one onward, consecutively and in conformity with the authority vested in said company by law. The railroad of said Parkersburg Branch Railroad Company from the southeast side of Avery street, in the city of Parkersburg, in Wood County, West Virginia, to its terminus at Grafton, in Taylor County, in West Virginia, being one hundred and four miles long, and including the branch in the city of Parkersburg, leading to the freight depot on Kanawha street therein, together with the appurtenances and equipment thereof and the revenues of said company therefrom are hereby pledged for the payment of this bond and the interest pro rata with the other bonds of the same issue; and in execution of such pledge, the said company has executed a mortgage for the total amount aforesaid of three million [fol. 82] dollars to T. Harrison Garrett, William F. Burns and John Gregg, of the City of Baltimore, and State of Maryland, as trustees of said railroad between the points aforesaid, with the appurtenances, equipments and revenues thereof, which has been recorded in the several counties through which the road passes. This bond is not to become obligatory on the company until the certificate endorsed hereon is signed by the trustees or their successor. In testimony whereof the said company hath hereto affixed its corporate seal and caused this bond to be signed by its President on the 1st day of July, 1879.

Form of Coupon

First Mortgage Loan of 1879

The Parkersburg Branch Railroad Company will pay to the bearer on October (or April) 1st, at the office of the Treasurer of the Baltimore and Ohio Railroad Company, in the City of Baltimore, State of Maryland, three hundred dollars, being half year's interest on Bond No. —, for ten thousand dollars.

— — —, Treasurer.

The interest coupon for the first three months shall be in the same form, and each of said bonds shall have endorsed thereon the certificate of the trustees to the effect that it is one of those secured by the said mortgage.

Resolved, that in order to secure the payment of said bonds for three million dollars, with the interest thereon, this Company do execute a mortgage or deed of trust to T. Harrison Garrett, William F. Burns and John Gregg, of the City of Baltimore, State of Maryland, as Trustees, upon the railroad of this company from the southeast side of Avery street, in the City of Parkersburg, in Wood County, West Virginia, to its terminus at Grafton, in Taylor County, West Virginia, being one hundred and four miles long, and including the Branch in the said city of Parkersburg, leading to the freight depot on Kanawha street therein, together with all the appurtenances

and equipment and the rights, privileges and franchises thereunto [fol. 83] belonging or in anywise appertaining, and the incomes, tolls, rents, issues, and profits thereof, including the roadway and tracks, rails and roadbed, side-tracks, bridges, viaducts, fences, stations, depots, machine shops, and all other buildings and structures whatever, docks and wharves, sand or gravel pits and deposits of materials and all other things belonging to, or used or designed for use, for or in connection with the said road between the points aforesaid, together with all the locomotives and tenders, freight and passenger cars and all other cars, and all other rolling stock or equipment whatsoever and all materials for the use of said road, together with all property and things of such nature or description as above mentioned, hereafter to be acquired by this company, for or in connection with the said line of railroad, or the working use or operation thereof, and especially all rents, revenues and moneys which may from time to time become due to said company from the Baltimore and Ohio Railroad Company, under the present or any future arrangement between the two companies in regard to the operation and working of said railroad, with a covenant in proper form for further conveyance and assurance as to such after acquired property.

Resolved—That the President cause the several instruments above mentioned to be prepared and that he affix thereto the company's seal and cause the coupons to be signed by the Treasurer, and that he do or cause to be done such other acts and things as may be appropriate to perfect the said bonds and mortgage or deed of trust in due form to carry out the purposes of these resolutions and to effectuate the lien of said bond and mortgage or deed of trust.

Resolved—That the President be and he is hereby authorized to sell or dispose of the said bonds for three million dollars from time to time for such prices and on such terms as he shall deem for the interest of said company, and that he is further authorized to use said bonds, or the proceeds thereof, in payment of the indebtedness of the company in such manner as he shall deem for the interest of the company.

Resolved—That the foregoing resolutions, and the form of mortgage to be executed in accordance therewith be submitted to the meeting of the stockholders of this company, which has been duly called [fol. 84] for that purpose, to be held at the City of Parkersburg, in Wood County, West Virginia, on the 27th day of June, eighteen hundred and seventy-nine, and whereas, at a general meeting of the stockholders of the said Parkersburg Branch Railroad Company, a corporation of the State of West Virginia, duly called by the directors thereof, and held in the City of Parkersburg, Wood County, West Virginia, on the twenty-seventh day of June, eighteen hundred and seventy-nine, the hereinbefore recited resolutions of the Board of Directors were then submitted to said stockholders and by them approved, and this present form of mortgage to secure said bonds was also submitted to said stockholders, and by them approved, and the following resolution was read and unanimously adopted:

Resolved—That the action of the Board of Directors in authorizing the issue of the bonds of this company to the amount of three million

dollars, to be secured by a trust deed, or mortgage, as shown by the resolutions herewith submitted, be and the same is hereby approved; and the President of this company be, and he is hereby authorized and directed for and in behalf of this company, and for and as its act and deed, to affix its corporate seal to said mortgage or deed of trust and to sign the same as President, and cause the same to be duly attested by the Secretary of this Company, and to execute, acknowledge and deliver the same. Now this indenture witnesseth, that in pursuance of the above recited resolutions of the Board of Directors and of the stockholders, respectively, of the party of the first part and to carry out the plans and schemes thereof and in order to secure the due payment of the principal and interest upon the above mentioned bonds of the party of the first part, amounting to three million dollars, which are or are to be executed under the corporate seal of said company, with the signature of its President, and to have annexed thereto such coupons and have endorsed thereon such certificate of the Trustees as provided for in the resolution aforesaid, and in pursuance of the execution of the power and authority in the party of the first part in any wise vested and in this behalf enabling, and in consideration of the premises, and of one dollar to the party of the first part in hand paid by the parties of the second [fol. 85] part, and at and before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, the said party of the first part has given, granted, bargained and sold, aliened, revised, released, conveyed and confirmed and by these presents doth give, grant, bargain and sell, alien, revise, release, convey and confirm unto the said parties of the second part, as joint tenants, and to their successors in said trust, all and singular, the railroad of the party of the first part, from the southeast side of Avery street in the City of Parkersburg, in Wood County, West Virginia, to its terminus at Grafton, in Taylor County, in said State, being one hundred and four miles long, and including the branch in the said City of Parkersburg, leading to the freight depot on Kanawha street, therein, together with all the appurtenances and equipment, rights, privileges and franchises, unto the said railroad belonging, or in any wise appertaining, and the incomes, tolls, rents, issues and profits thereof, including the roadway and tracks, rails and roadbed, side tracks, bridges, viaducts, stations, depots, machine shops and all other buildings and structures, docks and wharves, sand or gravel pits and deposits of materials, and all other things belonging to or designed for use for or in connection with said railroad between the points aforesaid, together with all locomotives, tenders, freight and passenger cars, and all other cars and all other rolling stock or equipment whatsoever of the said railroad, and all materials for the use of said railroad, including as well all property and things whatsoever of any such nature or description, as is above mentioned, which shall be hereafter acquired or possessed by the said company for or in connection with its said line of railroad between the points aforesaid, or the working use or operation thereof as such property or things are now possessed or owned by the said company, and especially all rents, revenues and monies which may from time to time become

due to said company from the Baltimore and Ohio Railroad Company under the present or any future arrangement between the two companies in regard to the operation and working of said railroad, to have and to hold the same to the said parties of the second part as joint tenants, and to their successors in said trust, their heirs and assigns forever, but upon trust nevertheless for the benefit and security of the several persons, who shall be or become holders, respectively, of the above mentioned bonds of the party of the first part, issued or to be issued as aforesaid, to secure to the holders of such bonds equally without preference of one over another by reason of priority in time of issue thereof, or otherwise, the due and punctual payment of the principal of said bonds and the interest thereon, according to the tenor and effect of said bonds, and the coupons attached thereto, it being the intention and purpose of this mortgage that the railroad property and the revenues of the party of the first part as above described, shall be pledged to secure the bonds of the party of the first part and the interest thereon as above described. And it is hereby declared, provided and agreed and these presents are upon the express condition that if the said party of the first part shall punctually, well and truly pay the principal sum specified in the above mentioned bonds, and the interest from time to time thereon according to the tenor and effect of said bonds aforesaid, then these presents and estates rights and interests thereby granted shall cease, *otherwise and* become of no effect, and that until default shall be made by the party of the first part in the due and punctual payment of such principal sum of the bonds of the party of the first part, or such interest thereon, the said party of the first part shall be entitled to remain in possession, use and enjoyment of its railroad premises, property, rents and interest hereby mortgaged or conveyed in trust, and it is hereby further provided, declared, granted and agreed that if the said party of the first part shall at any time make default in the due and punctual payment of the interest accruing upon its bonds, or any of them, and such default shall continue for ninety days after demand made, the whole principal sum secured by its said several bonds numbered from one to three hundred consecutively, or such of the same as shall then be outstanding, shall at the option of the holders of such bonds, respectively, become and be due and payable and demandable immediately, together with any arrears of interest thereon, anything in the said bonds of the party of the first part or hereinbefore contained to the contrary notwithstanding and with like full effect, as if this premium was inserted in each of said bonds, and it is further provided, granted, declared and agreed that any default of the said party of the first part in respect of the interest upon its bonds or any of them shall be of like effect, as if there had been a total default in the payment of the said bond or bonds at maturity, and shall entitle the said parties of the second part, or their successors, to proceed with the enforcement of this mortgage or deed of trust as if there had been a total default by such party in the payment at maturity of the principal sum secured by its said bonds, and it is hereby provided, granted, declared and agreed that in case of default continued for ninety

days after demand made as aforesaid, in the due and punctual payment of the principal and interest upon the said bonds of the party of the first part hereby secured, or any of them, said parties of the second part, or their successors in said trust shall, upon the written request of the holders of the majority of the bonds of the party of the first part then outstanding, without applying to any court, and without any other order or proceeding, for and on behalf of the holders of the several bonds entitled to the benefit of the security provided by this indenture, enter upon and take possession of all and singular the premises, property, rights and interests of said party of the first part hereby mortgaged or conveyed in trust, and use and operate the same, and take and receive the income, tolls and profits thereof; and likewise proceed under the order or decree of any court of equity, or other competent court, having jurisdiction in the premises, to sell and dispose of at public auction, and thereupon convey to the purchaser or purchasers, free from all right, claim or equity of redemption of said party of the first part, its successors or assigns, all and singular, the premises, property, rights, interest and franchises of said party of the first part, hereby mortgaged or conveyed in trust, or intended so to be, and from the net proceeds realized by means of such use and operation and from such sale or from either, in the first place to retain and pay all proper costs, charges and disbursements incurred in or about the premises, including the reasonable compensation of the trustees, and then apply such net proceeds to or towards the payment and discharge equally and without preference of the principal and interest at such time owing and unpaid upon all and singular of said bonds hereby secured and then remaining outstanding, whether the same be then due, or to become due, unowing [fol. 88] and paying any surplus there then may remain after the full satisfaction of all of such bonds and interest thereon to the said party of the first part, its successors or assigns. And the said party of the first part doth hereby covenant, promise and agree that in case of any default on its part as aforesaid, it will not set up claim or seek to take advantage of any valuation, stay, appraisement or extension laws, or other laws which may then exist in order to present or stay the immediate enforcement or foreclosure of this mortgage, or the absolute sale of its mortgage, property and rights thereunder, without and free from appraisement, valuation, stay of other condition or hindrance, but will and hereby does waive the benefit of any and all such valuation, stay, appraisement or other laws to such effect as aforesaid. And the party of the first part doth hereby covenant with the party of the second part and their successors, for and on behalf of the bondholders entitled to the benefit of the security hereby provided or intended so to be, that the said party of the first part, shall and will at any time, and at all times hereafter, upon reasonable request, make, do and execute all such other and further reasonable assurances, acts, deeds and things as in the opinion of competent counsel may be necessary or proper to effectuate the lien and security hereby intended to be created for the benefit of such bondholders, and especially to render subject to the lien of this mortgage, any and all after acquired property, of such description as is

here above declared to be intended to be embraced in the security hereby afforded or intended to be afforded, and it is hereby further declared and agreed that it shall and may be lawful for the said party of the first part, its successors or assigns, by and with the consent and approval in writing of said trustees or trustee for the time being, at any time or times hereafter to exchange for other property or to sell any part of the hereby mortgaged estates and premises of the said party of the first part, free and clear from the lien or encumbrance of these presents, and to convey the same without liability on the part of the purchaser, or the grantee for the disposition made of the price paid or property received in exchange, provided, however, that the proceeds of any sale so made shall, at the option of said party of the first part, be invested by it, either in the improvement of any remaining part of its mortgaged premises, or in the purchase by the [fol. 89] party of the first part of other property, real or personal, which property so purchased, as well as any that may be acquired in exchange as aforesaid by the party of the first part, shall be subject to all the trust hereby declared (including the power to sell or exchange herein named) of the property in the indenture described and (if it shall be so required by the Trustees or Trustee for the time being) shall be conveyed in mortgage by the party of the first part of the said Trustees or Trustee for the time being to be so held, and it is hereby further provided, declared and agreed, in case of the death, resignation, incapacity or removal of any of the said parties of the second part as Trustees, or of a vacancy in any way occurring in such trusteeship, such vacancy shall be filled by the appointment of a new trustee or trustees by any court or courts in the State of West Virginia, either State or Federal, having jurisdiction in the premises, which appointment may be made either upon the application of the party of the first part giving such notice as the Court may direct, or on application of the bondholders, or any one or more of them, giving such notice to the party of the first part as the Court may direct; and so from time to time as vacancies shall occur in the trusteeship the same shall be filled in the manner above provided so as to keep up the number of trustees to three, and each new trustee thus from time to time appointed, shall, upon such appointment without further act, deed or conveyance become and be vested fully with and subject to the estate, rights, forms and duties of the former trustee in whose place he shall be appointed, but nevertheless, the serving or remaining trustees, and the retiring trustee or representatives of a deceased trustee, shall, if required, made, do and execute any acts, deeds or things, which shall be requisite or proper, fully to vest in and confirm to such substituted trustees, such estate, rights and powers formerly vested in the trustee whom he shall succeed; and provided further and it is hereby declared that notwithstanding the above provision that the number of trustees shall be kept up to three when the said number shall be reduced below three, the serving or remaining trustees or trustee shall be vested with the estate and trusts and may execute and perform the duties thereof as fully as three could do until the vacancy shall be filled in the manner aforesaid [fol. 90] said; and it is fully declared that this mortgage is the first

mortgage on the railroad real and personal property, corporate rights and franchises of the party of the first part mentioned herein, except a mortgage heretofore executed by the North Western Virginia railroad company on the first day of January, in the year eighteen hundred and fifty-five, out of the bonds secured by said mortgage, only one hundred and forty thousand dollars remain unpaid, the payment of which has been assumed and guaranteed by the Baltimore and Ohio Railroad Company and the said parties of the second part hereby accept the said trust and covenant faithfully to execute the same. In witness whereof the said Parkersburg Branch Railroad Company, party of the first part has caused its corporate name to be hereunto subscribed by its President and its corporate seal to be hereunto affixed and the said parties of the second part have hereunto set their hands and seals on the day and year first above written.

The Parkersburg Railroad Company, by William Keyser, President. T. Harrison Garrett (Seal), William F. Burns (Seal), John Gregg (Seal), Trustees.

Attest: W. W. Van Winkle, Secretary. (Seal.)

Signed, sealed, executed and delivered in our presence. A. Maddison, G. Evett Reardon.

Attest as to signature of Trustees: John K. Cowen, A. Maddison.

[fol. 91] STATE OF MARYLAND,
City of Baltimore, ss:

I, G. Evett Reardon, a Commissioner, appointed by the Governor of the State of West Virginia, for the said State of Maryland, do certify that William Keyser, the President of the Parkersburg Branch Railroad Company, whose name signed to the writing above, bearing date on the first day of July, 1879, and who signed the name of the said railroad company and affixed its seal thereto has this day acknowledged the same before me in my said State, and acknowledged that he signed the corporate name and affixed the corporate seal of said company to said conveyance by the order of said company as its President; that he executed and delivered the said deed on behalf of said company as his free and voluntary act, and that the said company also executed said conveyance as its free and voluntary act for the use and purposes therein set forth.

Given under my hand and seal this fifth day of July, 1879.

G. Evett Reardon, a Commissioner for the State of West Virginia in the State of Maryland. (Seal.)

W. VA.:

Wood County Court Clerk's Office, July 8, 1879

The foregoing writing with annexed certificate was this day admitted to record in the Clerk's office aforesaid.

Teste: Thos. G. Smith, C. M. C.

A copy from Trust & Mortgage Book No. 4, page- 559-570. Teste:
B. F. Stewart, C. M. C.

EXHIBIT 110 WITH THE ANSWER OF THE CITY OF PARKERSBURG—
Filed June 14, 1894

This indenture, made this nineteenth day of December, in the [fol. 92] year one thousand eight hundred and eighty-seven, between the Baltimore and Ohio Railroad Company, a corporation, organized under the laws of the State of Maryland, party of the first part, and the Mercantile Trust and Deposit Company of Baltimore, also organized under the laws of said State, party of the second part, witnesseth that,

Whereas mortgages of the main line of its railroad from Baltimore, in Maryland, to Wheeling, in West Virginia, have been executed by the party of the first part to secure certain of its bonds and indebtedness, to-wit:

1. A mortgage to William G. Harrison, Trustee, of date April 29, 1853, to secure bonds to the amount of seven hundred thousand dollars.

2. Another mortgage, to William G. Harrison, Trustee, of date April 29, 1853, to secure bonds to the amount of two million five hundred thousand dollars.

3. A mortgage of date February 16, 1854, to secure the payment of the sum of five million dollars to the Mayor and City Council of Baltimore.

4. A mortgage to John W. Garrett, John Hopkins and James Tinker, Trustees, of date March 1, 1870, to secure bonds amounting to eight hundred thousand pounds sterling, equivalent to three million eight hundred and seventy-two thousand dollars in gold coin of the United States.

5. A mortgage to John W. Garrett, John Hopkins and James Tinker, Trustees, of date May 20, 1872, to secure bonds amounting to the sum of two million pounds sterling, equivalent to nine million six hundred and eighty thousand dollars in gold coin of the United States.

6. A mortgage to William Keyser, T. Harrison Garrett and William F. Burns, Trustee, of date, January 17, 1874, to secure bonds amounting to two million pounds sterling, equivalent to nine million six hundred and eighty thousand dollars in gold coin of the United States.

[fol. 93] The total amount of said bonds and indebtedness originally secured by said mortgages was thirty-one million four hundred and thirty-two thousand dollars.

And whereas, certain bonds secured by the first two mortgages hereinbefore mentioned have been paid, leaving outstanding and unpaid the sum of five hundred and seventy-eight thousand dollars

secured by the mortgage first hereinbefore mentioned, and the sum of one million seven hundred and ten thousand dollars secured by the mortgage secondly hereinbefore mentioned, and there has been paid into the sinking funds, reserved under the provisions of the four other mortgages above recited, the sum of one hundred and seventy-three thousand eight hundred pounds sterling, equivalent to eight hundred and forty-one thousand, one hundred and ninety-two dollars in bonds of the respective series of said mortgages, which bonds have been cancelled, thus leaving outstanding and unpaid bonds and indebtedness secured under the provisions of all said hereinbefore valid mortgages to the aggregate amount of twenty-nine millions six hundred and seventy-eight thousand eight hundred and eight dollars.

And whereas, it is desirable to fund all said bonds and indebtedness into consolidated mortgage bonds of one class, as nearly uniform in character as may be, to be secured by a single consolidated mortgage, so that said consolidated mortgage bonds may be used and disposed of for the purpose of taking up the said existing bonds and indebtedness of the party of the first part, or exchanged therefor or for securities in the sinking funds provided by the said mortgages, but so that the amount of such consolidated mortgage bonds shall not exceed the amount of said outstanding bonds and indebtedness.

And whereas by the act of the legislature of the State of Maryland incorporating the Baltimore and Ohio Railroad Company, passed at the December session in the year 1826, being Chapter 123 of the acts of that session, it is provided that the President and Directors of said company shall have power to borrow money and issue certificates or other evidences of loans and to pledge the property of the company for the payment of the same and the interest thereon.

And whereas, by another and supplemental act of the said legislature [fol. 94] of the State of Maryland, passed March 6, 1846, being Chapter 313 of the Acts of the Session of 1845, it is provided that, in exercising the above authority, the said President and Directors shall make and execute bonds or certificates of indebtedness under the seal of said company for such sums and payable at such time or times, and to sell and dispose of the same on such terms as the President and Directors may deem proper.

And whereas the President and Directors of the said Baltimore and Ohio Railroad Company, at a meeting duly held on the tenth day of December, in the year eighteen hundred and eighty-seven, at the office of said company, in the city of Baltimore, adopted certain resolutions in the words following:

"Whereas, certain mortgages have been heretofore executed by this Company to secure bonds and indebtedness of the company, to-wit, a mortgage executed April 29, 1853, to Wm. G. Harrison, Trustee, to secure the sum of seven hundred thousand dollars; another mortgage of the same date to Wm. G. Harrison, Trustee, to secure the sum of two million five hundred thousand dollars; another mortgage to the Mayor and city council of Baltimore of date

February 16, 1854, to secure the sum of five million dollars; another mortgage of date March 1, 1870, to John W. Garrett, John Hopkins and James Tinker, Trustees, to secure the sum of eight hundred thousand pounds sterling; another mortgage of date May 20, 1872, to John W. Garrett, John Hopkins and James Tinker, Trustees, to secure the sum of two million pounds sterling; another mortgage of date January 17, 1874, to William Keyser, T. Harrison Garrett and William F. Burns, Trustees, to secure the sum of two million pounds sterling; and there are outstanding and unpaid bonds and indebtedness secured by said several mortgages to the aggregate amount of twenty-nine million six hundred and seventy-eight thousand eight hundred and eight dollars.

"Resolved—That for the purpose of consolidating the bonds and indebtedness of this company and substituting the bonds hereinafter named for the existing bonds and indebtedness of this company, secured under the various mortgages hereinbefore recited, and for uncanceled securities in the sinking funds created by said mortgages, the Baltimore and Ohio Railroad Company shall issue its consolidated mortgage bonds to the amount of twenty-nine million six hundred thousand dollars, bearing interest at such rates as may be fixed from time to time, but not exceeding five per cent. per annum, and shall secure the payment of the same by a mortgage conveying to the Mercantile Trust and Deposit Company of Baltimore, as Trustee; all its main line, extending from Baltimore in Maryland, to Wheeling, in West Virginia, including all terminal property and facilities in each of said cities, together with the following branch lines, namely: The Curtis Bay Branch, the Locust Point Branch, the Metropolitan Branch, the Benwood Branch and the Frederick Branch; also two bridges across the Ohio river and approaches thereto, owned by the Baltimore and Ohio Railroad Company, and known as the Benwood bridge and the Parkersburg bridge, respectively, with all the equipment, franchises, income, tolls and property appertaining to or and in connection with said railroad branches and bridges respectively, and *and* all lands, tenements and hereditaments owned or procured by said party of the first part, on the line, or at the termini of said railroad, branches and bridges respectively, or in any way connected with the business thereof (excepting those now used for its general offices in the city of Baltimore); also all interest of said railroad company in telegraph property along its said railroad, branches and bridges.

Said mortgages shall further convey and assign to said Trustees, in due form, all the shares of stock of the Washington Branch of the Baltimore and Ohio Railroad, held by the Baltimore and Ohio Railroad Company, amounting at par to one million and twenty-eight thousand dollars; and likewise all the First mortgage Bonds of the Wheeling, Pittsburgh and Baltimore Railroad Company, held and owned by the Baltimore and Ohio Railroad Company, amounting to five million dollars."

"Resolved: That the form of bond and coupon so to be issued shall be substantially as follows, excepting such changes as may be made therein from time to time in the rate and amount of interest:

[fol. 96]

Consolidated Mortgage Bond

United States of America, State of Maryland

The Baltimore and Ohio Railroad Company

No. —.

\$1,000.

For value received, the Baltimore and Ohio Railroad Company promises to pay to the bearer, if this bond be not registered, or to the registered holder hereof, if registered, the sum of one thousand dollars, at the agency of said company in the city of New York, in gold coin of the United States of America, of the present standard of weight and fineness, on the first day of February, in the year nineteen hundred and eighty-seven, with interest thereon from February 1, 1888, at the rate of five per cent per annum, payable semi-annually in like gold coin on the first day of August and February in each year at the same place on the surrender of the annexed coupons, or if registered, to the registered owner hereof.

Said payments shall be made without any deductions by reason of any tax or assessment which said railroad company may be required to retain or deduct therefrom by any law of the United States, the States of Maryland, West Virginia or Ohio.

In case of default in the payment of any installment of interest due on this bond, for the period of ninety days after its maturity, the Trustee may and at the option of the holders of one-fourth in amount of all the then outstanding bonds of this issue, manifested by their written request, shall declare the whole principal sum hereof immediately due and payable with interest at the same rate as prior to default payable semi-annually from the date of such default.

This bond is one of a series, each for the sum of one thousand dollars, amounting in the aggregate to twenty-nine million six hundred thousand dollars, numbered from 1 to 29,600 consecutively, secured by and subject to all the provisions of a mortgage, valid the nineteenth day of December, 1887, conveying to the Mercantile Trust and [fol. 97] Deposit Company of Baltimore, Trustee, the railroad of the Baltimore and Ohio Railroad Company from Baltimore, in Maryland, to Wheeling, in West Virginia, including all terminal property and facilities in each of said cities, together with the Curtis Bay, Locust Point, Metropolitan, Benwood and Frederick branches thereof, the Benwood and Parkersburg bridges, and their approaches and all the franchises, appurtenances, equipment and terminal facilities thereof and the property now owned or hereafter acquired for use in connection with the said railroad, branches and bridges and all lands, tenements and hereditaments owned or procured by said party of the first part, on the line or at the termini of said railroad, branches and bridges, respectively, or in any way, connected with the business thereof, (excepting those now used for its general office in the City of Baltimore). Also all interest of said railroad company now existing or hereafter to be acquired in telegraph property along its said railroad branches and bridges—

Said mortgage assigns to said Trustee, as additional security for said bonds, shares of stock of the Washington Branch of the Baltimore and Ohio Railroad, amounting at par to one million and twenty-eight thousand dollars and all the First Mortgage five per cent bonds of the Wheeling, Pittsburgh and Baltimore Railroad Company, amounting to five million dollars, secured by a mortgage upon the line of railroad from Pittsburgh, Pennsylvania, to Wheeling, West Virginia, executed to John McCleave and James B. Washington, as Trustees, dated August 1, 1887.

This bond may, upon surrender for cancellation of all the unmatured coupons hereof, be registered in books, kept by said railroad company for the purpose, at its agency in New York, which registration shall be noted by endorsement hereon, after which registration the interest shall be payable only to the registered holder hereof, and the bond shall be transferable only in writing upon said books at said agency by the registered holder or his lawful attorney, and such transfer shall be noted by endorsement hereon.

This bond shall not become obligatory until it shall have been authenticated by a certificate endorsed hereon by the said Trustee or its successor in said trust.

[fol. 98] In witness whereof, the Baltimore and Ohio Railroad Company has hereunto caused its corporate name to be signed by its President and its corporate seal to be hereto affixed and the same to be attested by the signature of its secretary, this nineteenth day of December, 1887.

The Baltimore and Ohio Railroad Company, by ———, President.

Attest: ———, Secretary.

Form of Coupon

The Baltimore and Ohio Railroad Company will pay to bearer — Dollars in gold coin, at the agency of said company in the City of New York, on ———, being — months' interest on its consolidated mortgage bond No. — for one thousand dollars.

————, Treasurer.

Form of Trustees' Certificate

This is to certify that this bond is one of the bonds of one thousand dollars each, described in and named by the mortgage within referred to, which has been duly recorded.

Mercantile Trust & Deposit Company of Baltimore. ———
———, Trustee, by ———, President.

And whereas, there are now in the sinking funds provided by the several mortgages just hereinbefore recited, uncanceled securities amounting, at par, to the sum of eight million one hundred and seventy seven thousand nine hundred and twelve dollars.

[fol. 99] Therefore, resolved, that there be set apart of the consolidated mortgage bonds hereinbefore authorized, an amount not exceeding the sum of eight million one hundred and seventy seven thousand dollars (\$8,177,000), which bonds, or any of them, may be exchanged and substituted from time to time in lieu of uncanceled securities in the sinking funds or any of them, by the President and Directors of this company, upon such terms as may be agreed upon between them and the trustees of said sinking funds, respectively, and the said President and Directors are truly authorized to dispose any bonds or uncanceled securities so received from said sinking funds and of any of the said consolidated mortgage bonds so truly set apart which may not be exchanged or substituted for uncanceled securities in said sinking funds as aforesaid, but not to the extent of more than seven million five hundred thousand dollars (\$7,500,000) of said bonds so set apart, upon such terms as they may deem advisable.

Resolved, that the residue of said consolidated mortgage bonds which shall not be set apart to be exchanged, substituted or disposed of by virtue of the foregoing resolution, shall be appropriated to the purpose of retiring the existing bonds or indebtedness secured by the first six hereinbefore recited mortgages of this company. The consolidated mortgage bonds so received may from time to time be disposed of for such purpose only, or they may be delivered at the market price to the sinking fund trustees to be placed in said sinking funds, but in no case shall the same be disposed of to said trustees of the sinking funds at less than par; it being the intention that provisions shall be made for the investment with the assent of the sinking fund trustees of the annual contributions to the said sinking funds required by the said mortgages and of the annual *incumment* thereon, in the said consolidated mortgage bonds at their market price, but in no case at less than par."

And whereas, thereafter at said meeting of the President and Directors of the party of the first part, the form of this mortgage having been submitted and entered upon the minutes, it was

Resolved, that the President cause the said bonds to be prepared, and the same shall be signed by the President of the Company from [fol. 100] time to time as the same may be issued, and that the secretary affix thereto the company's seal and cause the coupons to be signed by the Treasurer (the engraving of whose signatures thereon shall be equivalent to the manual signing of the same); and that the said form of mortgage be approved; and that the same be made and executed by this company, under its corporate name, subscribed by its President with its corporate seal thereto affixed, attested by its Secretary, and when so executed that it be duly acknowledged and delivered to said Trustee and duly recorded."

Now, therefore, this indenture witnesseth: That the said party of the first part, for the purpose of securing the payment of the interest and principal of the said consolidated mortgage bonds hereinbefore mentioned and described, when and as the same shall become due and payable according to the tenor and effect of the said bonds so made and executed and in consideration of the premises, and

of the sum of one dollar, lawful money of the United States of America, to it in hand paid by the said party of the second part, at the time of the execution and delivery of these presents, the receipt whereof is duly acknowledged, has given, granted, bargained, sold, transferred, assigned, set over, released, conveyed and confirmed, and by these presents does give, grant, bargain, sell, transfer, assign, set over, release, convey and confirm unto the said party of the second part and its successors and assigns, and to its successors in the trust duly created, all and singular the entire line of railroad of the party of the first part, between Baltimore in Maryland and Wheeling in West Virginia, including all terminal property and facilities in each of said cities, and also the metropolitan branch railroad, extending from the point of Rocks, Frederick County, Maryland, to Washington, in the District of Columbia; the Curtis Bay Branch, extending from a point on the main line near Baltimore to Curtis Bay in the County of Anne Arundel, State of Maryland, the Locust Point Branch and appurtenances in the City of Baltimore, Maryland, and the Frederick branch in the county of Frederick, State of Maryland; the Benwood Branch in the County of Marshall and State of West Virginia; and also the two bridges across the Ohio river, owned and operated by the Baltimore and Ohio Railroad Company; the one known as the Benwood bridge, beginning in Marshall County, in [fol. 101] the State of West Virginia, and running through the town of Benwood, over the Ohio river into the town of Bellair in Belmont County, in the State of Ohio, together with the approaches thereof, the said bridge and approaches being of the total length of 8,558 feet, more or less, and the other of said bridges, known as the Parkersburg bridge over the said river, extending from the city of Parkersburg, in Wood County, in the State of West Virginia, over the Ohio river into the village of Belpre, Washington County, in the State of Ohio, and the approaches thereto, the total length of said bridge and approaches being 7,140 feet, more or less, together with the piers, abutments and mason works and tracks and all property belonging to or used in connection with said bridges or located thereon; and all lands, tenements and hereditaments owned or possessed by said party of the first part, on the line or at the termini of said railroad, branches and bridges, respectively, or in any way connected with the business thereof, excepting those now used by the party of the first part for its general offices in the City of Baltimore.

Together with all the appurtenances, rights, privileges and franchises unto the said railroad, branches, bridges and property belonging or in any wise appertaining, and the income tolls, rents, revenues, issues and profits thereof, the roadway, rights of way and tracks, rails and ties, roadbed, side tracks, turn outs, switches, bridges, trestling, viaducts, culverts, tunnels, stations, depots, machine shops, warehouses, water tanks, tools and implements of all kinds whatsoever, all other buildings and structures, docks and wharves and deposits of materials and all other things belonging to or used or designed for use for or in connection with the said railroad, branches and bridges, respectively.

Together with all the locomotives and tenders, freight and passenger cars and all other cars and all other rolling stock or equipment whatsoever and all materials for the use of such railroad, branches and bridges, respectively, including all property, things, franchises and rights whatsoever of any nature or description now owned or which shall be hereafter acquired or possessed by the said company in connection with the said lines of railroad branches and bridges, respectively, also all interest of said railroad company now existing [fol. 102] or which shall hereafter be acquired in telegraph property along its said railroad, branches and bridges.

Also all the first mortgage bonds of the Wheeling, Pittsburgh and Baltimore Railroad Company, amounting in the aggregate to five million dollars, said bonds being each for the sum of one thousand dollars, and numbered from one to 5,000 consecutively, and bearing interest at the rate of five per cent per annum, payable semi-annually on the first day of August and February in each year, and maturing on the first day of August, 1937, and secured by a mortgage executed by said last named railroad company to Johns McCleave and James B. Washington, Trustees, dated August 1, 1887, and also ten thousand and twenty eight shares of the stock of the said Washington Branch of the Baltimore and Ohio Railroad, each of said shares being of the par value of one hundred dollars.

Also all rentals, incomes, tolls and profits to be hereafter derived under and by virtue of a certain contract between the Baltimore and Ohio Railroad company and the United States Express Company of date August 17, 1887, whereby the express franchise and facilities of said railroad company were granted upon certain terms and conditions unto said United States express company; also all rents, income, tolls and profits to be derived under and by virtue of any contract to be made by the party of the first part, with the consent of the party of the second part, for the sleeping and parlor car privileges upon its railroad, branches and bridges; and subject to the terms and provisions of said express and sleeping and parlor car contracts to which reference is had. This mortgage is made, also including the benefit of all contracts with railroad companies or others for the utter change of traffic and the benefit of all other contracts, relating or appurtenant to the business of said railroad, its telegraph lines and its branches and bridges, or any of them.

To have and to hold all the aforesaid property, rights and privileges to the party of the second part and its successors and assigns in this trust, trusts and purposes following, to-wit:

Article First. For the equal benefit and security of all and every [fol. 103] the persons and bodies corporate who may be or at any time become the holders of the said consolidated mortgage bonds of the Baltimore and Ohio Railroad Company, without preference, priority or distinction as to lien or otherwise of any of the said bonds over the others by reason of the priority in the time of issuing the same, so that each and all of said bonds issued and to be issued as aforesaid shall have the same lien by virtue of this mortgage, and shall all be equally secured with like effect as if they had all been executed and delivered simultaneously herewith, it being the intention and pur-

pose of this portgage that the railroad, branches, bridges, equipment and property, franchises, rights, income bonds and stock above described shall secure the payment of the aforementioned consolidated mortgage bonds of the party of the first part above set forth and the interest thereon according to the time, tenor and effect thereof—and the party of the first part further agrees that it will punctually pay the interest on the bonds and indebtedness secured by the first six hereinbefore recited mortgages, and will likewise pay the interest on the bonds and indebtedness by the first six hereinbefore recited mortgages, and that it will punctually pay and discharge all taxes, assessments or other lawful charges that have been or may hereafter be legally levied, assessed or imposed and become a lien upon any part of the premises and property, rights and franchises duly mortgaged, or upon the party of the first part by reason of its ownership thereof or interest therein.

Article Second. If the party of the first part shall well and truly pay the principal and interest of the said consolidated mortgage bonds, according to the tenor and effect thereof, then these presents and the estates, rights and interest truly granted shall cease, determine and become of no effect, and until default be made by the party of the first part in the one and *and* punctual payment of said principal or interest, or any part thereof, or in the performance of any of the covenants or agreements by this mortgage required by it to be kept or performed, the said party of the first part shall be entitled to remain in possession, use and enjoyment of its said railroad, branches and bridges and other property duly mortgaged, except said stocks and bonds, and shall also be entitled to collect, through [fol. 104] the Trustee, all the dividends upon said Washington Branch stock and the interest upon the bonds of the Wheeling, Pittsburgh and Baltimore Railroad company aforesaid, the coupons for such interest to be delivered from time to time to the party of the first part by the party of the second part, or its successors in this trust for said purpose, and when delivered to be immediately collected and to be cancelled to the satisfaction of the Trustee, and the party of the first part expressly covenants and guarantees that the Wheeling, Pittsburgh and Baltimore Railroad Company will pay at maturity all lawful claims and demands against that company, which might if unpaid take precedence over the mortgage given to renew the said bonds of that company, but payment of the principal of said bonds of that company, or any part thereof, may, at or before its maturity, be extended by the party of the first part with the consent of that company and of the party of the second part, first procured, but not to a date later than the date of maturity of the bonds secured by this mortgage. If the principal of said bonds of the Wheeling, Pittsburgh and Baltimore Railroad Company, or any part thereof, shall be paid before the maturity of the consolidated mortgage bonds secured by this mortgage, the proceeds of such payment shall be used by said trustee in purchasing consolidated mortgage bonds, secured by this mortgage, and such bonds so purchased, shall be cancelled and delivered cancelled to the party of the first part. If such consolidated mortgage bonds can not be purchased at prices which may seem

reasonable to the said trustee, said trustees may in his discretion invest, or cause to be invested, the proceeds of said Wheeling, Pittsburgh and Baltimore Railroad Company's bonds so paid in the purchase of other property or securities, which property and securities so purchased shall be charged with and subject to all the trusts of this mortgage, and, in case such property and securities shall be so purchased, the same shall be at once deposited with and held by the said trustees as part of the property of this trust, in lieu and stead of the bonds of the said Wheeling, Pittsburgh & Baltimore Railroad Company so paid.

Article Third. If the party of the first part, its successors or assigns, shall at any time hereafter made default or refuse, neglect or [fol. 105] omit for any period, exceeding ninety days to pay the semi-annual interest on the consolidated mortgage bonds duly secured, or any of them, as it may become due, or shall default or refuse, neglect or omit for any period after the maturity thereof to pay the principal *some* of each and all of said bond, or shall suffer or allow any lawful taxes, charges or assessments to fall in arrear, whereby the security of this mortgage may be impaired, or shall refuse or fail to keep or perform any of the covenants or stipulations contained herein, on its part to be kept and performed, then and in either of such event, the party of the second part or its successors in this trust may, and upon the written request of the holders of one-fourth in amount of the bond secured thereby, which may be then outstanding, shall demand, and with such force as may be necessary, enter, take and maintain possession of all and singular, the said railroad, branches and bridges and all the estates, premises, rights, property and franchises thereby mortgaged, and as the attorney in fact or agent of the party of the first part, by its agents and substitutes, duly constituted, or by their managers, representatives, receivers or servants, may have, hold, use, manage, operate and enjoy the same, and each and every part thereof, to as full an extent as the party of the first part might lawfully do, and may take and receive the incomes, tolls, dividends, interest and profits thereof and the dividends upon said Washington Branch stock, and the interest upon the bonds of the said Wheeling, Pittsburgh and Baltimore Railroad Company, and may likewise proceed under the order or decree of any court of equity or other competent court having jurisdiction in the premises, to sell and dispose as by said Court may be decreed, and thereupon to convey to the purchaser or purchasers, free from all right or claim of equity of redemption of the said party of the first part, its successors or assigns, all and singular, the premises, property, rights, interests, franchises and privileges of the said party of the first part, hereinbefore described and hereby mortgaged.

Article Fourth. If the party of the first part shall at any time hereafter make default, or refuse, neglect or omit for any period ex-[fol. 106] ceeding ninety days, to pay the semi-annual interest on the consolidated mortgage bonds hereby secured, or any of them, or any part thereof, as it may become due, then said party of the second part may and upon the written request of the holders of one-fourth

in amount of said bonds then outstanding, shall declare the whole principal sum thereof one and payable, whereupon the whole principal sum of each and all of said bonds then outstanding shall forthwith be due and payable, notwithstanding the time for the payment thereof may not then have elapsed, and such principal, as well as the arrears of interest thereon, shall bear interest at the rate per cent per annum, fixed in said bonds, respectively, payable semi-annually from the date of such default.

Article Fifth. It is agreed that no holder or holders of any less proportion than one-fourth of the total amount in value of the outstanding bonds or coupons secured hereby, shall have the right to institute any suit, action or proceeding in equity, or at law for the foreclosure of this mortgage or the execution of the trusts hereof, or for the appointment of a receiver, or for any other under this mortgage, and that no such suit, action or proceeding shall be instituted without first giving thirty days notice in writing to the Trustee of the fact that default has occurred and continued as aforesaid and fully indemnifying it against all loss, costs, or damages arising from such suit, action or proceeding, and then only if the Trustee shall neglect and refuse for the period of thirty days after such notice to institute such suit, action or proceeding.

And in case of default in the payment of the party of the first part of the principal or interest of any of said bonds, or any part thereof, or of the breach of any covenant or agreement in this mortgage contained, the said Trustee may, and, upon written request of the holders of one-fourth in amount of such consolidated mortgage bonds then outstanding and upon the tender of them to it of adequate security, and indemnity against the costs, expenses and liabilities to be incurred thereby, shall proceed at law or in equity to foreclose this mortgage and to collect the said bonds and interest by proper proceedings to that end.

And it is further agreed that in case of any such foreclosure, if the whole principal sum of the bonds hereby secured shall not have all [fol. 107] ready matured or shall not have become due as provided by the fourth article hereof, but not otherwise, and if the Trustee shall not object thereto, it shall and may be competent for any court of equity having jurisdiction in the premises, at its discretion, to cover the sale of the whole or any part of said mortgaged premises and property rights and franchises, for the purpose of providing payment for the interest, taxes or other installments of money then in default, subject, however, to the payment of the interest and principal thereafter to become due upon the bonds hereby secured and to the performance of the conditions hereof.

In case of any decree for sale of the premises and property, rights and franchises hereby mortgaged, or any part thereof, not made subject as aforesaid to the interest and principal of said bonds thereafter to mature, the whole principal sum of all said bonds shall immediately upon the rendition of said decree and by the force thereof, become due and payable, and such principal sum as well as the arrears of interest thereon, shall bear interest at the rate per

cent, per annum, fixed in said bonds, respectively, payable semi-annually from the date of such default.

Article Sixth. It is further agreed that said Trustee and its successors in this trust shall be and they are hereby invested with all the authority and rights which any holder or owner of the said First Mortgage bonds of the Wheeling, Pittsburgh and Baltimore Railroad Company may have to enforce the payment of the principal or interest thereof according to the terms of said first mortgage executed by the Wheeling, Pittsburgh and Baltimore Railroad Company to secure said bonds, and they are hereby authorized to take all the necessary steps and proceedings provided by said first mortgage to enforce the payment of the interest and principal of said First Mortgage Bonds in case of any default upon the part of the said Wheeling, Pittsburgh and Baltimore Railroad Company.

Article Seventh. And the said party of the first part hereby agrees that in case of any default on its part as aforesaid, it will not set up a claim or seek to take advantage of any valuation, stay of execution, appraisal or extension laws, or any other laws which may exist in order to effect the stay or present the immediate enforcement and foreclosure of this mortgage or the immediate and absolute sale of said mortgaged premises, property, rights and franchises without and free from appraisal, valuation, stay or other condition or hindrance; but it will and does hereby waive the benefit of any and all such valuation, stay, appraisal or other laws to such effect as aforesaid.

Article Eighth. At any judicial sale of all or any part of the premises, property, rights and franchises hereby mortgaged, the said party of the second part, its successors and assigns, shall, if holders of three-fourths in amount of the then outstanding bonds secured by this mortgage, in writing so request, bid for and purchase the mortgaged premises, for and on behalf of the holders of all the bonds secured by this indenture, then outstanding, in proper time to their respective rights and interests, at such prices as may to said party of the second part, or its successors or assigns, seem reasonable and for the best interest of the bondholders, not, however, exceeding the amount of the accrued interest and principal of all the bonds outstanding and of all lawful taxes, assessments and charges in arrear, and of all costs and expenses incurred in and about the foreclosure and sale aforesaid.

In case the party of the second part should become such purchaser, it shall have the power to organize a new corporation upon such plan or basis as may seem most expedient for the purpose of owning and operating the said mortgaged premises, property, rights and franchises, and upon the organization of such new corporation it shall distribute its shares of capital stock or its corporate bonds, or both, as the case may be, among the holders of the bonds and coupons secured by this mortgage, giving preference to the holders of the past due coupons over the bonds as is elsewhere herein provided in case of the distribution of the proceeds of any sale, and

no bondholder shall be entitled to demand or receive anything more than his just proportion of said new stock or bonds, or both.

[fol. 109] Article Ninth. The Railroad Company, for itself and all persons and corporations lawfully claiming through or under it, or who may at any time become holders of liens prior to the time of this mortgage, hereby expressly waives and releases all right to have the mortgaged property marshalled and sold in parcels upon any sale thereof under the provisions of his mortgage; and the Trustee and any court by which foreclosure of this mortgage is decreed, shall have the right, at their discretion, to sell the entire mortgaged property of any description, as a whole, subject, however, to the right of a majority in interest of the holders of the bonds hereby secured then outstanding in writing, to direct and require the sale of said property in such other manner as they may deem best.

Article Tenth. It is further agreed that the net proceeds realized by means of the use and occupation or the sale of the property and premises, rights and franchises, hereby mortgaged, by the said Trustee or its successors in this trust, or by any court acting in the premises in any suit for foreclosure or otherwise, or by the collection of dividends or interest, or out of the proceeds of sale of the said Wheeling, Pittsburgh and Baltimore Railroad upon any foreclosure or other sale thereof as aforesaid, shall be appropriated and distributed as follows:

First. To pay all proper costs, charges and disbursements incurred in and about the premises, including a reasonable compensation to the said Trustee.

Secondly. To pay all taxes, assessments and lawful charges in default.

Thirdly. To pay the interest due on the consolidated mortgage bonds hereby secured and then outstanding and remaining unpaid.

Fourthly. Any residue thereof to be applied in payment of the principal of said consolidated mortgage bonds in full, whether the said bonds be then due or to become due, if such proceeds be sufficient for said purpose; and if not so sufficient, then the said residue [fol. 110] of said proceeds shall be applied pro rata in part payment of said bonds.

Fifthly. Any surplus remaining shall be paid to the party of the first part.

Article Eleventh. It is further agreed that and as the interest coupons annexed to the consolidated mortgage bonds secured hereby mature and are paid by the party of the first part, or any person or corporation for it or in its behalf, they shall be cancelled, and after default in the payment of any such coupons or if interest on any registered bonds, such coupons shall not be deemed to be secured by, or otherwise within the trusts of this mortgage, unless accompanied by the bonds to which the same were originally attached, nor shall

the interest so in default, on any registered bond be assignable separately from the bond itself.

Article Twelfth. It is further agreed that numbers 8,178 to 29,600, inclusive, of said consolidated mortgage bonds be, and the same are hereby set apart and appropriated to take up, retire or be substituted or exchanged for not less than an equal amount at par of the afore-said existing indebtedness and bonds secured by the six hereinbefore first recited mortgages upon the main line and branches of the Baltimore and Ohio Railroad Company and said consolidated mortgage bonds so renewed may, from time to time, be placed in the sinking funds hereinafter mentioned under the terms of the mortgages creating the same, provided the price at which the same may be disposed of to said sinking funds shall *in*, in no case, be less than par; and that numbers one to 8,177 of the said mortgage bonds, amounting in the aggregate to eight million one hundred and seventy-seven thousand dollars, be, and the same are hereby revived for the purpose of substituting the same, or any part thereof, in lieu of uncanceled bonds or other securities now in the said sinking funds, upon such terms and conditions as may be agreed on between the President and Directors of the party of the first part and the sinking fund Trustees, and that portion of said consolidated mortgage bonds, so last revived, which may not be exchanged for bonds or securities [fol. 111] in the said sinking funds, not exceeding in all seven thousand five hundred of said bonds, may from time to time be sold and disposed of on such terms as the President and Directors of said company may determine. It is, however, expressly agreed that all consolidated mortgage bonds placed in, or disposed of to, said sinking funds or to be exchanged for bonds or securities in the said sinking funds, shall bear interest at five per cent per annum, but whenever any of the said bonds which shall have *give* into any of the sinking funds shall revert to the party of the first part, the rate of interest thereon may be reduced by the party of the first part, and the same may be negotiated at such reduced rate of interest.

And after the payment and extinguishment of the entire amount of the indebtedness and bonds secured by any one or more of the six hereinbefore first recited mortgages upon the main line and branches of the Baltimore and Ohio Railroad Company, if there remains any of said consolidated mortgage bonds, which, by the terms of this mortgage, would have been applicable to the payment and extinguishment of said indebtedness and bonds so paid off and extinguished, but which were not in fact appropriated or applied to take up and retire the said indebtedness and bonds so paid off and extinguished, such bonds so remaining unappropriated and no longer necessary to be appropriated for the payment and extinguishment of the indebtedness and bonds secured by the said mortgage or mortgages and so paid off and extinguished, shall be delivered to the party of the first part to be cut and disposed of by it.

And the party of the first part expressly agrees that it will not extend the time for the payment of the bonds secured by the first,

second, fourth, fifth and sixth hereinbefore recited mortgages, or cause or procure or permit the same to be extended, but that, unless sooner paid or returned, it will cause the same to be paid or retired at their respective dates of maturity. But the party of the first part may, from time to time, extend or cause or procure or permit to be extended, the principal sum of the indebtedness to the Mayor and City Council of Baltimore, secured by the third hereinbefore recited mortgage, provided that the rate of interest during the periods of such extension or extensions shall not exceed five per cent per annum.

[fol. 112] Article Thirteenth. The Trustee may be removed at any time by an instrument in writing, under the bonds of a majority in interest of the holders of the bonds secured hereby and then outstanding, with the written assent of the Railroad Company, or without such assent of the railroad company, by an instrument in writing, under the hands of the holders of said bonds, amounting in the aggregate to seventy-five per cent of those then outstanding, and in case a Trustee should die, or should resign or be removed, as herein provided, or by a court of competent jurisdiction, the holders of a majority in amount of the then outstanding bonds, with the assent of the railroad company, shall have the right and power by instrument in writing under their hands to appoint a new trustee to fill such vacancy and until such appointments be so made. The Board of Directors of the railroad company may appoint a new trustee to fill such vacancy and until such appointments be so made, the Board of Directors of the railroad company may appoint a new trustee to fill such vacancy for the time being and in either case the new Trustee so appointed shall, while he continues as such, have and possess and be subject to the like rights, power, estates and duties as if he had been the original trustee hereunder. Should any vacancy be filled by the company under the foregoing provisions in that behalf it shall be competent for any State or Federal Court in the States of Maryland or West Virginia, having jurisdiction in the premises, upon the application of a majority in amount of the bondholders, to annul such appointment and to appoint the Trustee nominated by such majority; and should any deeds, conveyances, or instruments in writing, to be executed, acknowledged and delivered on the part of the railroad company and the resigning or removed Trustee or either of them, be required by such new Trustee for more fully and certainty vesting in and confirming to him such estates, rights, forms and duties, such deeds, conveyances and instruments of writing shall, on request, be made, executed, acknowledged and delivered. It is understood and agreed that the word "Trustee" when and as used in these presents, is intended to refer to and describe and shall be *continued* to mean body or bodies, corporate, or person or persons which or who for the time being shall be charged with the execution of the trusts of these presents, whether the same [fol. 113] be the said parties of the second part or any successor or successors of the said parties of the second part hereunder.

Article Fourteenth. The party of the first part hereby covenants that it will, from time to time, hereafter and as often as thereunto reasonably requested in writing by the party of the second part and its successors in the trusts duly created, or by the holders of a majority of the said bonds execute and deliver any and all further deeds, covenants and assurances in law for the purpose of vesting in and assuring unto the said party of the second part and its successors in the said trusts herein expressed, the premises, property, rights and franchises hereby mortgaged, whether now owned or possessed or hereafter acquired by the said party of the first part as by the said Trustee or the holders of a majority of the bonds may be advised or required.

Article Fifteenth. And it is hereby further declared and agreed that it shall and may be lawful for the party of the first part, with the written consent under seal of the party of the second part, or its successors in this trust, but not otherwise (except as to its sleeping and drawing room cars, which said party of the first part may sell or leave without the consent of said Trustee) at any time or times hereafter to exchange for other property, or to sell, lease or otherwise dispose of, and property connected with its railroad branches and bridges aforesaid, which the said company in the judgment of its President and Directors may not need for its use, free and clear from the lien or encumbrance of these presents, and to convey the same without liability on the part of the purchasers, lessee or grantee for the disposition made of the price or rental paid or property received in exchange; provided, however, that the proceeds of any sale, lease or other disposition so made (except the proceeds of sale of said sleeping and drawing room cars, which proceeds shall be free from the trusts of this mortgage) shall, within a reasonable time, be invested by the party of the first part in the purchase by said party of the first part of other real or personal property, which property so acquired or purchased or exchanged shall be subject to all the trusts hereby declared, and if demanded [fol. 114] by the Trustee, or its successors in this trust, shall be conveyed or delivered by the party of the first part to the party of the second part, or its successors in this trust, to be held subject to the trusts of this mortgage, or said proceeds may be invested by the party of the second part in the purchase at their market value of the bonds hereby secured, which bonds so purchased shall be forthwith cancelled and delivered to the party of the first part.

Article Sixteenth. And the party of the first part further expressly covenants and agrees that it shall and will, at the expiration of thirty days after any installment of interest secured hereby may become due and payable, deposit with the Trustee a sum sufficient to pay to all such installments of interest or any part thereof, as may then remain unpaid as a special fund for the payment of such interest remaining unpaid and this shall relieve the railroad company of any further liability, for the same; and upon such deposit being made the money so deposited shall thereafter be and remain the only fund for the

payment of such installments of interest or any part thereof, and the money so deposited shall be appropriated, solely for the purpose of paying such unpaid installments of interest and shall not — withdrawn or applied to any other purpose than the payment of such unpaid installments of interest, until the expiration of the period limited by the statute of Limitations of the State of Maryland, for the recovery in actions for said interest against said Trustee, when it shall be paid the party of the first part.

Article Seventeenth. It is hereby understood and agreed that the remedies herein provided for the collection of the said bonds and interest and the foreclosure of said mortgage are cumulative and that more than are of the same or any other remedy provided by law may be invoked.

Article Eighteenth. And it is further agreed that the interest and principal payable according to the tenor and effect of the said bonds shall be paid by the said party of the first part on the days and time mentioned in said bonds, respectively, without further delay and without deduction from either interest or principal for any part of any tax or assessment which the party of the first part may be required to retain or deduct therefrom by any law of the United States [fol. 115] of America, or of the States of Maryland, West Virginia or Ohio.

Article Nineteenth. The party of the first part hereby covenants that until payment in full by it of the interest and principal of the bonds secured by this mortgage, it will not sell, mortgage, lease or otherwise incur its Washington branch, extending from the relay house to Washington City, and that the shares of stock aforesaid shall not, nor shall any of them be voted on in favor of, but the same shall be voted against any such sale, mortgage, lease or other incumbrance, and that if any such sale, mortgage, lease or other incumbrance be made, it shall be prior and subordinate to the trusts of this mortgage.

And this indenture witnesses that Samuel Spencer, President of the Baltimore and Ohio Railroad Company is hereby appointed the Attorney of the said The Baltimore and Ohio Railroad Company to acknowledge these presents as its act and deed.

In witness whereof the said party of the first part has caused its corporate name to be hereunto subscribed by its President and its corporate seal to be hereunto affixed and attested by its Secretary, and the said party of the second part, in token of its acceptance of the trusts herein created and confined, has herewith caused its corporate name to be subscribed by its President and its corporate seal to be hereunto affixed and attested by its Secretary, on the day and year first above written.

The Baltimore and Ohio Railroad Company, by Samuel Spencer, President. Attest: W. H. Ijams, Secretary. (Seal.) Signed, sealed and acknowledged in our presence: John K. Cowen, Andrew Anderson. Mercantile Trust & Deposit Company of Baltimore, by John Gill, President.

[fol. 116] Attest: L. C. Fisher, Secretary. (Corporate Seal.)
Signed, sealed and acknowledged in our presence: John K.
Cowen, Andrew Anderson.

STATE OF MARYLAND,
City of Baltimore, To wit:

I hereby certify that on this nineteenth day of December, in the year 1887, before me, the subscriber, a Justice of the Peace of said State in and for said City, personally appeared Samuel Spencer, President of the Baltimore and Ohio Railroad Company, and the Attorney named in the foregoing deed, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said deed to be the act and deed of the said the Baltimore and Ohio Railroad Company and also at the same time personally appeared before me said Samuel Spencer, President of the Baltimore and Ohio Railroad Company, whose name is signed to the foregoing mortgage and for and on behalf of said railroad company acknowledged said mortgage and the signing and sealing thereof to be the act and deed of the Baltimore and Ohio Railroad Company, and at the same time before me also personally appeared John Gill, the President of the Mercantile Trust & Deposit Company of Baltimore, Trustee, as therein mentioned, and made oath in due form of law on the Holy Evangel of Almighty God, that the consideration is true and bona fide as therein set forth and that he is the President of the Mercantile Trust and Deposit Company of Baltimore, Trustee, and is the duly authorized agent of the said company to make this affidavit.

G. Evett Reardon, J. P.

STATE OF MARYLAND,
City of Baltimore, To wit:

I hereby certify that G. Evett Reardon, Esq., before whom the [fol. 117] foregoing acknowledgment and oaths were made, and who has thereto subscribed his name, was, at the time of so doing, a Justice of the Peace for the State of Maryland in and for the City of Baltimore, duly commissioned and sworn, and as such, under the laws of said State, was duly authorized to take affidavits and acknowledgments of deeds.

Jas. Bond, Clerk of the Superior Court of Baltimore City.
(Seal Superior Court.)

STATE OF WEST VIRGINIA:

Wood County Court Clerk's Office, January 5, 1888

Recorded as per certificate on original trust of this date.

Teste: H. G. Smith, C. M. C.

Copy from Trust and Mortgage Book No. 13, pages 253, 281.

Teste: B. F. Stewart, C. M. C.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF
WEST VIRGINIA

[Title omitted]

ANSWER OF J. W. DUDLEY—Filed June 27, 1894

The answer of John W. Dudley, sheriff, one of the defendants in above-entitled cause, to a bill in equity exhibited against him and the city of Parkersburg by the Baltimore & Ohio Railroad Company in said court.

This Respondent, for answer unto so much of the Bill as he is advised is proper and necessary for him to answer unto, for answer, [fol. 118] says: that this respondent is the Sheriff of the County of Wood and State of West Virginia, duly elected and qualified; that he has no knowledge of the matters and things alleged in the plaintiff's Bill of Complaint except so far as the same refer to the tax bill which was placed in respondent's hands for collection, a copy whereof, with the levy endorsed thereon, is herewith filed, marked "Dudley's Exhibit No. 1." The respondent further shows that this tax bill was sent to him by the Auditor of the State of West Virginia, under and pursuant to the laws of said State; and that the respondent was required and in duty bound, under the law, to collect the same.

Respondent, further answering, says that in his effort to collect said tax bill, he went to the Honorable John A. Hutchinson, counsel of the Baltimore & Ohio Railroad Company and of the Parkersburg Branch Railroad Company, and requested the payment of the said bill of taxes; and Mr. Hutchinson told him to levy on two engines of the Baltimore & Ohio Railroad Company, which respondent accordingly did, by direction of the counsel of the plaintiff,—which engines are mentioned in the plaintiff's Bill of Complaint; and shortly thereafter, and after the making of said levy, the respondent was served with a writ of Injunction from this Honorable Court, and has done nothing whatever towards collecting said bill since being so served.

Respondent says further, *says* that no part of said taxes has in any way been paid or satisfied, and the respondent is the only person authorized under the law to receive or collect the same.

He further says that he has no interest in this suit, save in the performance of his official duty, and he prays to be hence dismissed with his reasonable costs, and as in duty bound, &c., he will ever pray, &c.

John W. Dudley, S. W. C. Laird & Turner, of Counsel.

STATE OF WEST VIRGINIA,
County of Wood, ss:

John W. Dudley, being duly sworn, upon his oath, says that he is [fol. 119] the respondent named in the foregoing Answer; that the matters therein contained, so far as stated upon his knowledge, are

true, and so far as stated upon information derived from others, he believes the same to be true.

John W. Dudley.

Sworn and subscribed before me this 25th day of June, 1894.
Given under my hand and official seal. W. W. Jackson,
Notary Public of Wood Co., W. Va. (Seal.)

EXHIBIT NO. 1 FILED WITH ANSWER OF J. W. DUDLEY—Filed, June
27, 1894

(Railroad Assessment)

STATE OF WEST VIRGINIA:

Auditor's Office

Charleston, Feb. 26, 1894.

It is hereby certified that the amount of taxes and levies assessed against the Parkersburg Branch (B. & O.) Company in the County of Wood for Municipal purposes for the year 1893 is as follows, viz:

For State purposes.....	
For General School purposes.....	
For County purposes.....	
For District purposes.....	
For Municipal purposes.....	\$1,042.73
— District.....	
Parkersburg Mnc. Corp.....	
Total	\$1,042.73
To which I have added ten per centum.....	104.27
Making the whole amount due.....	\$1,147.00

[fol. 120] The said railroad Company has failed to pay said taxes and levies by the 20th day of January, 1894, as required by law.

Your attention is respectfully called to chapter 52, Acts 1883, which defines your duties respecting this matter.

Very respectfully, I. V. Johnson, Auditor.

To J. W. Dudley, Esqr., Sheriff of Wood County.

(Upon the back whereof is the following endorsement:)

April 7, 1894—Levied for the within taxes this day upon Locomotives Nos. 748 and 501 situate in the yards of the Parkersburg Branch (B. & O.) Railroad Company at Parkersburg, Wood County, West Virginia, as the property of the said Parkersburg Branch (B. &

O.) Railroad Company. Property not sold by reason of an injunction of the Circuit Court of the United States for the District of West Virginia, awarded by the said Court April 10, 1894, in the suit of the Baltimore & Ohio R. R. Co., against the City of Parkersburg, and Jno. W. Dudley, Sheriff, &c. The copy served on me being hereto attached and made a part of this return.

J. A. Muncey, Deputy for J. W. Dudley, S. W. C.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF
WEST VIRGINIA

[Title omitted]

EXCEPTIONS NO. 1 TO ANSWER OF CITY—Filed June 20, 1894

Exceptions taken by the above named plaintiff to the answer of [fol. 121] the defendant, the City of Parkersburg, for impertinence—

1. For that the said answer is impertinent in this: That it sets forth matter not responsive nor material to any proper defense to the bill of complaint in this cause, in alleging on the third folio, the following: "Respondent further answering, charges that the Town of Parkersburg subscribed Fifty Thousand Dollars to the stock of the North Western Virginia Railroad Company, and paid said subscription through bonds which were paid by taxes levied upon its citizens, and property liable to taxation, and that such money was subscribed and paid by said town, and nothing whatever, was received by it in stock-dividends or other incomes, and that by the sale of the said North Western Virginia Railroad Company in 1865, the whole of the said investment was wholly lost; that the subscription of the town to the stock of the railroad exceeded several times the value of all the property conveyed by the railroad to the said town," which is a matter not in issue and is therefore impertinent.

2. And for that said answer is impertinent in this: That on the fifth folio, the said answer makes the following immaterial and irresponsible charge:—"And charges that the Baltimore and Ohio Railroad Company did, under and by virtue of the right vested it by law, create as many shares of stock in said corporation, The Parkersburg Branch Railroad Company, as it saw fit, and that upon such conveyance being made, the said Parkersburg Branch Railroad Company became a separate and distinct corporate body from the said Baltimore and Ohio Railroad Company that had no ownership of the property of the Parkersburg Branch Railroad Company, and no interest therein, other than as stockholder. And respondent denies that the Baltimore and Ohio Railroad Company became the owner of the works and the property of the North Western Virginia Railroad Company, as they were at the time of the making the said mortgages aforesaid and all the other property of which the North Western Virginia Railroad Company was seized and possessed at the

time of said sale, but charges and avers that the same became the property and estate of the said Parkersburg Branch Railroad Company."

[fol. 122] 3. And for that said answer is impertinent in this: That on the eighth, ninth and tenth folios thereof, the said answer makes the following immaterial and impertinent allegations:

"Respondent would further show unto the Court that it is at all times subject to the will of the Legislature by whose authority alone it exists and acts, and that the Legislature of the State of West Virginia in the exercise of its sovereign power, by an act thereof passed on the 28th day of February, 1877, and by acts amendatory thereof passed from time to time, took entirely away from and out of respondent's power the right to assess, levy and collect any taxes upon the property of the railroad companies used in connection with their business within its jurisdiction, and among others, the Parkersburg Branch Railroad Company and the Baltimore and Ohio Railroad Company, respectively, and vested the whole power of the assessment and collection of said taxes in the Board of Public Works and Auditor of said State."

"And Respondent further says, that by said statute its officers were compelled under a penalty of a heavy fine to certify to the Auditor of the State its levy for taxes for general purposes upon other property within its corporate limits, and that the taxes were then collected by the Auditor or under his direction, by the Sheriff of Wood County, and by the one or the other paid to respondent's Treasurer."

"And so completely has the Legislature taken away from respondent the power to levy and assess such taxes and the control of the collection thereof, that it has prohibited your respondent and its officers under the penalty of a fine from in any way compromising or remitting any portion of the taxes so assessed by said Auditor, even in case a dispute between respondent and any railroad within its jurisdiction as to the validity of the tax or the amount assessed for respondent's benefit."

4. And for that said answer is impertinent in this: That on the Ninth and Tenth folios thereof, the said answer proceeds to quote, allege and set forth in detail certain common and general provisions of the Statute law of West Virginia with reference to the assessment of railroad property for taxation, and thereby in this manner, stuffing [fol. 123] said answer with recitals and long digressions as to matters of fact, as well as of law, wholly immaterial, and which could in no way be set up or proved upon any issue presented by the plaintiff's bill of complaint.

5. And for that the said answer is impertinent in this: That on the tenth, eleventh, twelfth to and including the thirteenth folios of said answer, the said respondent sets forth divers immaterial and irrelevant allegations and statements respecting property and title to property asserted to belong to the plaintiff, where neither the title or right to property, nor the proper assessment of the same is in issue as

charged and set up in said answer, and the whole of these details are impertinent in any particular.

6. And for that said answer is impertinent in this: That on the thirteenth folio of said answer the following immaterial and impertinent particular charge is made in said answer which, if true, could not be a defense, to the issue presented by the title in this cause, that is to say: "Respondent says that all of complainant's property is subject to taxation and that no taxes thereon have been paid to respondent except upon that part of complainant's bridge across the Ohio River, in said city, excluding the approach thereto." And also the following impertinent allegations next following the preceding: "Respondent says, as appears from the ordinances of 1865 and 1867, it granted the franchise and privilege to the Parkersburg Branch Railroad Company to use and occupy Washington, now Sixth street, with its tracks, trestles and pier from Avery street in said city to the Ohio river, but the fact is that complainant so occupies the said street with its trestles, piers and tracks, as an approach to its said bridge, and that the same is the property of complainant and is of great value, to-wit: \$200,000.00 at the least, and that no taxes thereon are paid to respondent by complainant or any other person, as respondent is informed and believes."

7. And for that the said answer is also impertinent and immaterial [fol. 124] in this: That on folios 14 and 15 of said answer, the following charges are made, that is to say:—"Respondent charges, upon information and belief, that the Parkersburg Branch Railroad Company has owned no rolling stock whatever but that an immense rolling stock used on the tracks of the Parkersburg Branch Railroad Company is, and has been the property of complainant; that complainant owns a large amount of personal property, machinery, fixtures, buildings and appendages in said city and County of Wood.

"Furthering answering, respondent says that the Baltimore and Ohio Railroad Company has made no return to the Auditor of the State, as required by the aforesaid section 67, of its property in Wood County, West Virginia, except of its bridge, excluding the approach aforesaid and has paid no taxes upon its said property to said Auditor for respondent or to respondent, as it is informed and believes, not even upon the two engines alleged to be of the value of \$20,000.00, which the Sheriff of Wood County has levied upon at the direction of John A. Hutchinson, Esq., chief counsel of complainant in West Virginia, to satisfy taxes for the year 1893, assessed upon property returned to the said Auditor as the property of the Parkersburg Branch Railroad Company."

"Respondent says that for many years past, except for the year 1892, the Parkersburg Branch Railroad Company, under the cover of said supposed and illegal exemption has paid no taxes to or for respondent's benefit, by reason of the illegal neglect and failure of the officers of respondent and State of West Virginia to enforce the collection thereof; and charges that complainant cunningly and craftily pretending that all of the property aforesaid was the property of the

Parkersburg Branch Railroad Company, in order to evade assessment and payment of taxes to respondent upon its property; has fraudulently and willfully returned a part of its property to said Auditor as the property of the Parkersburg Branch Railroad Company in order to screen it behind the said exemption so illegally claimed by the Parkersburg Branch Railroad Company, and thereby escape the payment of taxes to respondent, but in truth a large part of the \$1,042.73 [fol. 125] assessed as taxes was so assessed upon the property of complainant and never owned by the Parkersburg Branch R. R. Co. or the North Western Virginia R. R. Co."

"Further answering, respondent says, that it has endeavored to obtain from the Secretary of State and Secretary of the Board of Public Works of West Virginia, the return of the property made by the Parkersburg Branch Railroad Company and the Baltimore and Ohio Railroad Company, respectively, of the respective properties so far as the same may be applicable to this respondent, but has been unable so to do, the said officer feeling constrained to refuse such information to respondent."

"Respondent further says that, as it is informed and believes, the Parkersburg Branch Railroad Company is by virtue of a lease or contract operated by the Baltimore & Ohio Railroad Company, which lease or contract was made by and at the instance of the complainant, it being the chief stockholder in said Parkersburg Branch Railroad Company and thereby controlling the same throughout every department, and that by the terms of said lease or contract the said Baltimore & Ohio Railroad Company is bound to pay the taxes due upon the said Parkersburg Branch Railroad. And Respondent repudiates and denies the insinuation in the said bill contained that complainant is compelled to pay said taxes by reason of its purchase of the property of the North Western Virginia Railroad, which allegations are not responsive to any charges contained in the bill of complaint, and are impertinent."

In all which particulars this exceptant excepts to the said answer as impertinent and irrelevant, and humbly insists that said impertinent matters may be expunged from said answer; and that the said defendant may be compelled to put in a full and proper and pertinent answer to said bill of complaint.

Jno. A. Hutchinson, Sol. for Plff.

June 21, 1894. .

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[fol. 126] IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
DISTRICT OF WEST VIRGINIA

[Title omitted]

EXCEPTIONS NO. 2 TO ANSWER OF CITY—Filed June 20, 1894

Exceptions Taken by the Above-named Plaintiff to the Insufficient
Answer of the Defendant, the City of Parkersburg

First Exception. For that the said defendant, The City of Parkersburg, has not fully and particularly answered in regard to the allegations in said bill respecting the payment by the plaintiff to the City of Parkersburg, of the sum of \$7,500 as alleged in said bill:

Second Exception. For that the said answer is insufficient, because it is argumentative, and instead of responding to the allegations of the bill directly and particularly, undertakes to make charges against the plaintiff which are immaterial and not responsive to the allegations of the bill and attempts to argue the contention between the plaintiff and defendant digressing upon immaterial and irrelevant matters.

Third Exception. For that the said answer is insufficient and immaterial and not responsive to the bill, and the matters alleged hereinafter particularly referred to are entirely unnecessary to the determination of the issue presented by the bill and ought not to be joined with the matters that may be responded to properly in a sufficient answer of the defendant, The City of Parkersburg, if it could make any such answer:

And this respondent refers to its exceptions taken to the said answer by the said plaintiff marked No. 1, in which exceptions the [fol. 127] particular statements and clauses of said answer are set forth at large, and which are therein charged to be impertinent, and they are now herein referred to and made part hereof, and excepted to as insufficient.

In all which particulars this respondent excepts to the said answer as insufficient and irrelevant and humbly insists that the said answer may be stricken out and the irrelevant matter expunged therefrom, and the said defendant be compelled to put in a full and sufficient answer to said bill.

Jno. A. Hutchinson, Counsel for Plff.

June 24, 1894.

IN U. S. CIRCUIT COURT

AMENDED AND SUPPLEMENTAL BILL—Filed August 16, 1895

To the Honorable Judges of the Circuit Court of the United States
for the District of W. Va.:

The amended and supplemental bill of complaint of the Baltimore and Ohio Railroad Company, which is a corporation created and existing under and by virtue of the laws of the State of Maryland, and having its principal office and place of business in the said State, and as such a citizen of said State of Maryland, filed in said Circuit Court, and by leave thereof against the City of Parkersburg and John W. Dudley, the Sheriff of Wood County; the said City of Parkersburg being a body corporate and politic created by and existing under the laws of the State of West Virginia, and the said John W. Dudley, Sheriff of Wood County aforesaid, being a citizen of the State of West Virginia.

And thereupon your orator complains and says that heretofore, to-wit, on the 10th day of April, 1894, it filed in this Honorable Court its certain bill of complaint against the said defendants, wherein amongst other things it alleged and showed that on the 14th day of February, 1851, the General Assembly of Virginia passed an act to incorporate the Northwestern Virginia Railroad Company, which is referred to as found printed in the Session Acts of the General [fol. 128] Assembly of Virginia of 1851-52. That by said act constituting the charter of said company, it was authorized to construct a railroad from Parkersburg, in the County of Wood, to intersect the line of the Baltimore and Ohio Railroad at some eligible and convenient point at or near the mouth of Three Forks, in the County of Taylor, in the then State of Virginia, now West Virginia. That the said Northwestern Virginia Railroad Company afterwards was duly organized and obtained its necessary rights of way *way* and with the money and aid furnished by the Baltimore and Ohio Railroad Company, constructed its railroad from Parkersburg, in the County of Wood, to the terminus in the said County of Taylor, now called Grafton.

That in order to raise the necessary funds to construct the said road, the Northwestern Virginia Railroad Company, under the authority given it by its charter, did, on the 21st day of March, 1853, execute a deed of trust or mortgage to the Mayor and City of Baltimore, on all its then present and future property, in order to secure certain bonds therein, amounting to the sum of one million five hundred thousand dollars, which were guaranteed by the said May- and City Council of the City of Baltimore, and also on the same day, to-wit: on the 21st day of March, 1853, the said Northwestern Virginia Railroad did execute to the Baltimore and Ohio Railroad Company, and subject to the first mortgage aforesaid, a second mortgage to secure one million of dollars in the bonds of the Northwestern Virginia Railroad which were guaranteed by the Baltimore and Ohio Railroad Company, copies of which mortgages are filed

with the said original bill, marked Exhibits "A & B," and are respectfully referred to and made part hereof.

It is further alleged in said original bill that by said mortgages, all the property, road-bed, works and lots in the City of Parkersburg and other property then or thereafter acquired by the said Northwestern Virginia Railroad Company, were included and conveyed.

That on the 13th day of March, 1854, John J. Jackson and others, by deed duly executed, conveyed to the Northwestern Virginia Railroad Company, certain real estate along and upon the banks and shores lines of the Ohio and Little Kanawha Rivers in the said town of Parkersburg, with certain wharf rights and privileges, in consideration of a large sum of money named in said deed, to-wit: in consideration of the sum of \$16,000 paid to them in the bonds of said company, which said lands, rights and privileges, were and are of great value. A copy of said last mentioned deed duly certified is filed and marked Exhibit "C" as part of said original bill, and praying to be read and considered herewith.

In said original bill it is further alleged and shown that no other railroad than the Northwestern Virginia Railroad was in contemplation and under construction from the line of the Baltimore and Ohio Railroad, in Taylor County, westward by way of the vicinity of Parkersburg, at the time the said town made the deed and entered into the contract hereinafter next mentioned, bearing date June 8th, 1855, and it was not fully determined whether the said Northwestern Virginia Railroad would terminate at Parkersburg, or by a branch line, would go further down the Ohio River, and if the latter should be done, it would materially affect the interests adversely of the said town of Parkersburg. And by said original bill it was further alleged and shown that in view of these facts, the citizens and authorities of said town, in order to induce the Northwestern Virginia Railroad Company to make said town its actual Western terminus and to carry out the intent of the statutes in such case made and provided, in aid of such intended improvement, on the 8th day of June, 1855, the President, Recorder and Trustees of the Town of Parkersburg, entered into a certain contract in writing under seal with the Northwestern Virginia Railroad Company, and agreeing to the terms and conditions thereof set forth in the record and proceedings of the meeting of the Council of said town, held on the said 8th day of June, 1855, a copy of which record is filed herewith marked Exhibit "D" as part of said original bill. That the said contract was made at the same time that the deed next hereinafter referred to was executed, and the same are to be read and considered as one transaction, and by the said contract, the Northwestern Virginia Railroad Company agreed to construct a graded wharf for the said town, to be completed by the time its railroad should be opened to the public, extending from the upper line of Ann Street around the Point to the upper line of Kanawha Street extending to the Ohio [fol. 130] River and within three years thereafter to construct a wharf with suitable grade to the foot of Court street, now third street, in the city of Parkersburg, the same to be sixty (60) feet wide, or as much thereof as may be necessary to be for the use of

the Ohio Ferry &c., as fully set forth in said contract, and shown by the third section of said agreement marked Exhibit "D" as aforesaid.

It further appears that on the said 8th day of June, 1855, the President and Recorder and Trustees of the Town of Parkersburg, by Henry Logan, its President, acting for and on behalf of said Recorder, Trustees of the Town of Parkersburg, authorized to act, and the North Western Virginia Railroad Company by Thomas Swann, its President, under the seal of the said Town and under the seal of the said railroad company, executed a deed whereby amongst other things, the said town of Parkersburg the party of the first part, granted certain franchises, rights and privileges to the said Northwestern Virginia Railroad Company, and to its successors, and amongst these franchises, rights and privileges, the said party of the first part, meaning the said town of Parkersburg, for and in consideration of the covenants and stipulations therein set forth, and in consideration of the real estate, rights conveyed to said town by the Northwestern Virginia Railroad Company, did further grant and covenant to and with the parties of the second part, meaning the Northwestern Virginia Railroad Company, that all of the property owned, used and occupied by the parties of the second part and its successors within the jurisdiction of the parties of the first part, meaning the Town of Parkersburg, for and in consideration of the covenants and stipulations therein set forth, and in consideration of the real estate, and rights conveyed to said town by the Northwestern Virginia Railroad Company, did further grant and covenant to and with the parties of the second part, meaning the Northwestern Virginia Railroad Company, that all the property owned and occupied or used by the parties of the second part and its successors within the jurisdiction of the parties of the first part, meaning the town of Parkersburg, so long as the same should be owned, used or appropriated by them, the party of the second part and its successors, for purposes connected with the business of their railroad, should be free from all town taxes, assessments and charges, [fol. 131] and that all the privileges thereby granted and assured by the parties of the first part to the parties of the second part in said deed, should apply as fully to property and rights thereafter acquired, used or occupied by them, meaning the said railroad company and its successors, within the said town and jurisdiction, as well as to those they then owned, used or occupied or might thereafter acquire, use or occupy &c.; and in consideration of the foregoing covenants, agreements and stipulations of the parties of the first part, including the exemption from town taxes, assessments and charges the said North Western Virginia Railroad Company, the party of the second part, did thereby grant and convey to the party of the first part, the town of Parkersburg and their successors, all the right, title and interest and estate granted and conveyed to them the parties of the second part, meaning the said town, by the said deed from John J. Jackson and others, of record in Wood County, and to the use and residue not thereinbefore mentioned, to be used and occupied by the parties of the second part, all the lands, banks and shores described in the said deed, with the water rights and

appurtenances thereunto belonging to be used exclusively for wharf landings and other purposes connected with the uses of the Ohio and Little Kanawha Rivers, and to be improved by the parties of the first part and their successors for such purposes from time to time as the business and conveniences of the said town might require or render necessary or desirable &c., all of which will be more fully seen by reference to the copy of said deed of June 8th, 1855, duly acknowledged and recorded and made part of the said original bill, marked Exhibit "E" and referred to and prayed to be read in connection with this amended and supplemental bill.

And in and by said original bill it was further shown that at a regular meeting of the council of the said town of Parkersburg, held on the 13th day of July, 1855, the President of the Council of the town reported that the said deed of June 8th, 1855, had been made and executed by the President upon the part of the council, and by Thomas Swann, President of the North Western Virginia Railroad Company on the part of the said company, each conveying to the other their interests in certain portions of the river, banks and other [fol. 132] rights and privileges as set out in the resolutions adopted at a special meeting held June 8th, 1855, which is now of record in the Clerk's office of the County Court of Wood County. A copy of the minutes of said meeting of July 13th, 1855, is filed marked Exhibit "F" as part of said original bill, and is prayed to be read in connection herewith.

And that by said original bill, it is further shown that at the time of the execution of said deed, the North Western Virginia Railroad Company had acquired certain town lots in the town of Parkersburg, which it had appropriated to the business of its road, and that since the date of said deed it acquired other lots and property in the said town for the purpose of its use and which were appropriated and have been constantly used in connection with the business of said road, and which by the terms of said deed and contract were to be free from town taxes and assessments.

Your orator further shows that said real estate, lots and property last mentioned have been used and occupied by it in connection with the business of the said road under its purchase as hereinafter stated.

Your orator further shows that by said original bill it is alleged that the President, Recorder and Trustees of the Town of Parkersburg, at the date of said deed June 8th, 1855, and the contract aforesaid made at the same, had full power and authority to make the said deed and contract and the covenants therein contained in consideration of the terms and conditions and privileges therein stated, whereby the North Western Virginia Railroad Company's real estate, lots and property in the town of Parkersburg, should be free and exempt from all town taxes and assessments, and that from that time to the present the said parties, the said town and its successors, and the said North Western Virginia Railroad Company and its successors have acted upon and ratified and adhered to said covenants and stipulations in said deed and contract contained, except as hereinafter mentioned.

And your orator further shows that it is alleged in said original bill, that under the conditions and stipulations set forth in said mortgages hereinbefore referred to bearing date March 21st, 1853, such proceedings were had under said mortgages, that afterwards, to-wit: on the — day of February, 1865, they were foreclosed by a sale [fol. 133] of all the lands, property, works, rights and interests of the North Western Virginia Railroad Company, in said town and along the line of said railroad, and also of the franchises of said railroad company and that at such sale, your orator being the principal stockholder of the said Northwestern Virginia Railroad Company, and guarantor of one million of the bonds as mentioned and set forth in said two mortgages, became the purchaser thereof, and that under the laws of West Virginia (Code of 1860, chapter 61) then in force, it had the right, and did by and under the deed which was executed to it, declare that it would become a corporation as to said property, by the name of the Parkersburg Branch Railroad Company, according to the statutes in such case made and provided, and that said sale was made under the first mortgage of said mortgages, and the deed of conveyance that was executed in pursuance to said sale passed to your orator as the purchaser, not only the works and property of the Northwestern Virginia Railroad Company as they were at the time of the making of the deeds of trust or mortgages aforesaid, but also all other property the Northwestern Virginia Railroad Company was seized and possessed at the time of the sale, and that amongst other rights, properties and interests belonging to the Northwestern Virginia Railroad Company, which by said deed of conveyance under said foreclosure sale and proceedings, were transferred to and passed by the said conveyance to your orator, and which thereby became the property of your orator for the purpose of its said branch railroad, were all the lands and lots, tracts or parcels of land belonging to the said Northwestern Virginia Railroad Company, situated in the town of Parkersburg, together with the benefits of contracts or covenants relating to said property then existing between said town and said Northwestern Virginia Railroad Company.

Your orator further shows that in said original bill it was alleged that the City of Parkersburg was incorporated in the year 1860 as successor of the Town of Parkersburg, and from time to time its jurisdiction has been extended by the Legislature of the State of West Virginia, and that on the 30th day of May, 1865, the Mayor and Council of the City of Parkersburg passed an ordinance authorizing [fol. 134] the extension of the Parkersburg Branch Railroad, which is the name of the railroad given by your orator to its purchase, through the city to the Ohio River, and the third section thereof of said ordinance declares that the said deed of the 8th day of June, 1855, that all ordinances and parts of ordinances passed by the said town and accepted by the North Western Virginia Railroad Company, to be in full force and binding on the City of Parkersburg, and the Parkersburg Branch Railroad Company as the successor of the former parties to said deed and said ordinance. A copy of said third section of said ordinance is filed, marked "Exhibit G" as part of said original bill, and prayed to be read in connection herewith.

And your orator further shows by said original bill it is alleged that on the 20th day of February, 1865, the Legislature passed an act to empower certain railroad companies to purchase and hold real estate in the City of Parkersburg, in Wood County, which act is referred to and made part of this bill. Chapter 73 of the Acts of 1875. That afterwards, to-wit: on the 10th day of May, 1867, the Mayor and Council of the City of Parkersburg passed an ordinance entitled an ordinance to widen Washington street &c., and that under the third section thereof, the said contract and deed of June 8th, 1855, and all ordinances and parts of ordinances were declared to be in full force and binding on the city of Parkersburg and the successors of the Northwestern Virginia Railroad Company, and that by the Fourth section thereof, certain permissions and privileges granted by the ordinance of May 10th, 1867, were declared to be upon the terms and conditions therein mentioned, that is to say, that the Parkersburg Branch Railroad Company which was the representative as well as the creature of the Baltimore and Ohio Railroad Company, should, without unnecessary delay, proceed to the construction of the wharf at the foot of Court Street on the Ohio River, in the City as provided in said deed and conveyance, and complete the same at the costs and charges of the said company on or before the 1st day of December, 1868, &c., a copy of said ordinance of May 10th, 1867, is filed herewith marked Exhibit "H" as part of this bill.

Your orator further shows that it is alleged in said original bill, that afterwards, to-wit: on the 15th day of March, 1870, the Mayor [fol. 135] and Council of the City of Parkersburg passed another ordinance entitled an ordinance to amend and re-enact the ordinance passed May 10th, 1867, &c., and by the first section thereof, it was provided that if the Parkersburg Branch Railroad Company should, within thirty days from and after the passage of this ordinance, pay to the City of Parkersburg the sum of \$7,500, that sum to be received as a performance and discharge of the terms and conditions of the fourth section of the ordinance passed May 10th, 1867, and of the contract embraced in said original contract of June 8th, 1855, and the deed in pursuance thereof. A copy of which said ordinance is filed with the said original bill marked "Exhibit I" and prayed to be read in connection herewith.

Your orator further shows that it is alleged and is a fact as alleged in said original bill, that for and on behalf of the Parkersburg Branch Railroad Company, it advanced and paid to the city of Parkersburg the said sum of \$7,500, which the said City received and accepted as a full performance and discharge of so much of said contract of June 8th, 1855, section three as hereinbefore referred to relating to the building of the wharf at the foot of Court street, now third street on the Ohio River in said City.

And it is further shown in said original bill your orator now charges that by virtue of said deed of June 8th, 1855, and of the said contract of the same date, and according to the terms, covenants and stipulations therein contained, the property of the North Western Virginia Railroad Company in the town and City of Parkersburg, was made free of all taxes and assessments or other charges, and

that this freedom from taxation and exemption were in effect a commutation of all taxes and assessments and other charges which the said city or town may thereafter levy or make against or upon the property of said North Western Virginia Railroad Company and its successors in consideration of the transfer of the property conveyed to the said town of Parkersburg by the said Northwestern Virginia Railroad Company under said deed and contract of June 8th, 1855, and to the benefit of which the said City of Parkersburg has succeeded by an amendment of the charter of the said town of Parkersburg as hereinbefore set forth.

And your orator now here further shows that — virtue of its purchase of the property of the Northwestern Virginia Railroad Company [fol. 136] and by virtue of the laws of the State of Virginia and of West Virginia, and the charter of the Northwestern Virginia Railroad Company in force in the State of West Virginia at the time of the sale of said property under said mortgages, your orator succeeded to right and title in and to all the property and rights of the said Northwestern Virginia Railroad Company and that under the laws of the State of West Virginia at the time your orator purchased said property under said foreclosure proceedings, it had the right to give a name to the franchise and estate of the corporation whose property and works were sold, and that it is entitled under the law to the benefit of the commutation and exemption provided for by said deed and agreement of June 8th, 1855, so made by the City of Parkersburg with the Northwestern Virginia Railroad Company, against all town taxes and assessments or charges in the said Town or City of Parkersburg, levied or made since the date of said deed and agreement, and that the said City of Parkersburg by the ordinances hereinbefore referred to and made part hereof, by the acceptance and receipt of the sum of \$7,500 aforesaid, ratified and fully confirmed, if any such confirmation or ratification were necessary, the said contract or commutation and exemption from taxation as aforesaid, and that your orator had hoped that the City of Parkersburg would refrain from making any claim or from interfering with your orator in its rights in the premises growing out of said exemption and commutation from taxation as aforesaid, which commutation and exemption have always hereto been ratified and confirmed by the said town and city of Parkersburg.

Your orator further shows and alleges that the said town of Parkersburg in 1855 had the right to and was not prohibited from making said deed and contract with the Northwestern Virginia Railroad Company aforesaid, and that there was nothing in the constitution or laws of the State of Virginia which in any wise inhibited such transaction on the part of said parties and especially of said town, and that nothing in the constitution or laws of the State of West Virginia subsequently adopted or enacted after the making of said contract could in any wise alter or impair the validity of said contract or the obligation thereof.

Your orator further shows that such proceedings were had on said [fol. 137] bill as that an order of injunction was awarded by this

Honorable Court, restraining and prohibiting the said City of Parkersburg and the said John W. Dudley, Sheriff, from proceeding to collect said taxes for the year 1893, and that afterwards the said city of Parkersburg filed its demurrer to said original bill on which demurder the said cause is still pending.

And now so it is may it please your Honors, the City of Parkersburg now claims that it has the right to collect taxes on the property so exempted and commuted from taxation as aforesaid, and that as alleged in said original bill, it claims the sum of \$1,042.73 as taxes for the year 1893 against your orator and against the Parkersburg Branch Railroad Company, and that it has given out notice that it intends to collect the said taxes and assessments for the year 1893 as alleged in said original bill, and as alleged in said original bill the said John W. Dudley, Sheriff of Wood County, proceeded to levy upon for the purpose of collecting the taxes and assessments, two locomotives engines of the value of \$20,000 at least as set forth in said original bill.

And now by way of amendment and supplemental to said original bill, your orator alleges that since the filing of said original bill, the said city of Parkersburg has caused to be placed in the hands of the said John W. Dudley, the Sheriff of Wood County for purposes of collection, certain taxes against the property of your orator in said city, which taxes include taxes against the property exempted from taxation under said contract and ordinances of said town and City of Parkersburg as aforesaid, amounting to the sum of \$1,786.05 for the year 1894, with ten per centum added making a total of \$1,964.65, and that the said John W. Dudley, as sheriff of said Wood County under the direction of said city has actually levied on the following property of your orator, to-wit, one locomotive engine, number 439, of great value, to-wit: \$10,000.00, and that unless restrained and inhibited by the process of this Honorable Court, the said Sheriff will seize and take into his possession the said property so levied upon by him, and sell the same to satisfy said illegal taxes.

Your orator further says it has always paid all the taxes and assessments due from it in the County of Wood and City of Parkersburg to which said County and City are entitled according to law, [fol. 138] and that as alleged in said original bill and the sum last mentioned for the years 1893 and 1894, as aforesaid for taxes illegally imposed upon its property in said city, and that it is not bound to pay the ten per centum which is illegally charged upon said taxes for which said levy is also made by said Sheriff. Your orator files herewith a statement of the taxes as shown by the books of the auditor of the State of West Virginia for the year 1894 charged against it in the County of Wood and City of Parkersburg showing in the column of municipal taxes the said sum of \$1,786.05, which is a total thereof at the rate of \$1.10 per thousand upon the valuation of \$162,368.79, which account is marked Exhibit X part of this amended and supplemental bill. Your orator files herewith also, the statement "L" which is filed with said original bill showing the real estate and property so assessed with City Taxes and which your orator claims is exempt as aforesaid.

Your orator further charges that the City of Parkersburg cannot, under the law of the land with impunity violate its covenants and agreements with your orator as the successor in title and right of the Northwestern Virginia Railroad Company as aforesaid, and it is in bad faith, unjust, inequitable and fraudulent on the part of said city, after having for more than twenty years had the benefit of the sum of \$7,500 put into its Treasury by your orator as the successor under its purchase of the Northwestern Virginia Railroad Company's property and franchise, and in consideration of said release, commutation and exemption from taxation by said City, to ignore, violate and repudiate the said deed and agreement and contract and its obligations thereunder, and your orator charges that it is entitled to the interposition of a court of equity against said acts and conduct of said City in its effort to ignore and violate said deed and agreement.

Your orator charges that it is a fraud upon your orator after said City has had the undisputed use of your orator's property and money as aforesaid, transferred to and paid in consideration of said commutation and exemption of municipal taxes, assessments and charges for the city to attempt to collect such taxes and yet retain said property and the rents, issues and profits thereof, and the said sum of \$7,500 with the interest thereon for twenty-four years and upwards. [fol. 139] Your orator further shows said taxes so claimed constitutes a lien upon the property of your orator and a cloud upon its real estate in said city which is of great value, to-wit: of the value of \$70,000 at the least.

Your orator charges that the seizure and sale of this property by the said Sheriff in attempting to collect said illegal taxes, will operate as an irreparable injury to your orator, there being no plain, adequate remedy at law under any statute or proceeding in the State of West Virginia, whereby your orator could recover the amount of said taxes if paid to said Sheriff for said City, and no redress by the strict rules of common law is afforded your orator in the premises.

In tender consideration whereof your orator prays that the City of Parkersburg and John W. Dudley, Sheriff of Wood County, may be made parties defendant to this bill, that they may be compelled to answer the same (the oath to the answer of the said City, and said Dudley being waived), and that the said City and its officers and agents, and the said Sheriff, his deputies, agents and attorneys and all persons acting under him, may be perpetually restrained and enjoined from levying and collecting said taxes or any part thereof, and the ten per cent damages and interest claimed thereon by any levy upon and sale of any of the property of your orator or by any other course or proceedings in attempting to collect said illegal taxes; and the farther prayer of your orator is, that if it shall be compelled to pay said taxes or any part thereof, that the said City may be compelled to refund and pay to it said sum of \$7,500 with the interest thereon, and to convey and transfer to your orator all the real estate conveyed in said deed of June 8th, 1855, and that it shall account to your orator for the rents, issues and profits received by the said town or city from the said property so conveyed as a consideration of said commutation and exemption from taxation, and that your

orator may have such other further and general relief in the premises as to equity may seem meet and as in duty bound it will ever pray &c.

May it please your Honors to grant your orator the United States most gracious support.

Jno. S. Hutchinson, Sol. for Plff.

[fol. 140] Jurat showing the foregoing was duly sworn to by John Adair omitted in printing.

IN U. S. CIRCUIT COURT

[Title omitted]

DECREE ENTERED AUGUST 16, 1895

On this 16th day of August, 1895, came the said plaintiff, by its counsel, and exhibited a certain amended and supplemental bill of complaint verified by affidavit and prays an injunction against the defendants to restrain them from proceeding by way of levy upon or seizure or sale of the property of the said plaintiff or otherwise to collect certain taxes in the said bill mentioned and claimed to be due to the City of Parkersburg for the year 1894 from the plaintiff for taxes assessed, as in the bill mentioned for said year 1894.

And thereupon the said amended and supplemental bill having been seen and inspected by the court, leave is given to file the said amended and supplemental bill, and upon motion of the plaintiffs, by its counsel, the 2nd day of October, 1895, is fixed as the time and the United States Court House at Clarksburg, in the County of Har- [fol. 141] rison, as the place for the hearing and determination of said application for said injunction, and upon the further motion of the plaintiff, by its counsel, process of subpoena is awarded upon said bill against the defendants therein named, returnable at Rules to be held in the Clerk's office of this court, and also a notification to be served upon said defendants warning them to appear and be before the Judges of the Circuit Court of the United States for said District at the time and place specified herein, to show cause why said injunction should not be granted; And upon the further motion of the said plaintiff and for reasons appearing to the court, it is further ordered that upon due service of such subpoena in chancery and notification and a copy of this order shall be sufficient notification and said defendants shall be and stand, and they are to be temporarily enjoined and prohibited from proceeding by way of levy upon or seizure and sale of the property of the said plaintiff or otherwise, to collect the said taxes for the year 1894 or any part thereof, and this temporary injunction shall be and continue until the said 2nd day of October, 1895, and until the hearing and determination of said application for said injunction.

EXHIBIT X FILED WITH AMENDED AND SUPPLEMENTAL BILL—Filed
August 16, 1895

(Railroad Assessment)

STATE OF WEST VIRGINIA:

Auditor's Office

Charleston, July 8th, 1895.

It is hereby certified that the amount of taxes and levies assessed against the Baltimore and Ohio R. R. (Parkersburg Branch) Company, in the County of Wood, for State, General School, County, District and Municipal purposes, for the year 1894, is as follows, viz:

[fol. 142]

For State purposes	
For General School purposes.....	
For County purposes.....	
For District purposes.....	
For Municipal purposes, Parkersburg.....	\$1,786.05

Total	\$1,786.05
To which I have added ten per centum.....	178.60

Making the whole amount due..... \$1,964.65

The said Baltimore and Ohio R. R. (Parkersburg Branch) Company has failed to pay said taxes and levies by the 20th day of January, 1895, as required by law.

Your attention is respectfully called to Chapter 52, Acts 1883, which defines your duties respecting this matter.

Very respectfully, I. V. Johnson, Auditor.

To J. W. Dudley, Esqr., Sheriff of Wood County.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT
OF WEST VIRGINIA

[Title omitted]

DEMURRER TO AMENDED AND SUPPLEMENTAL BILL—Filed Sept. 3,
1895

The demurrer of the above-named defendant, the City of Parkersburg, to the amended and supplemental bill of complaint filed by the Baltimore & Ohio Railroad Co. in said court against this defendant and John W. Dudley, sheriff of Wood County.

This defendant, by protestation, not confessing or acknowledging [fol. 143] all or any of the matters or things in the said Bill of Com-

plaint contained, to be true in such manner and form as the same are in said bill set forth and alleged, does demur to the said bill, and for cause of demurrer shows,

First. That it appears by the plaintiff's own showing by the said bill that it is not entitled to the relief prayed against this defendant.

Second. That it appears by the said bill that the Parkersburg Branch Railroad Co. is a corporation created and existing under the laws of the State of West Virginia, and as such, a citizen of the State of West Virginia, and that said corporation last named is a necessary party to the said bill, but it has not been impleaded or made a party thereto.

Third. It appears by the said bill that the claims which the plaintiff seeks to set up are certain alleged contracts existing between the City of Parkersburg and the North Western Virginia Railroad Company, which the bill alleges passed to and vested in the Parkersburg Branch Railroad Company under the laws of the State of West Virginia, the last named corporation being a separate and a distinct person from the plaintiff.

Fourth. That the bill shows upon its face that this Honorable Court has no jurisdiction of the subject matter of this suit, and that real party in interest is the said Parkersburg Branch R. R. Co. and this defendant, both being bodies corporate and created and existing under the laws of the same State, and as such citizens of the same State.

Fifth. That it appears by the said bill that the plaintiff is the owner of the stock of the Parkersburg Branch R. R. Co., and being such owner and holder of the stock of the last named corporation, the plaintiff cannot maintain its said bill in violation of Equity Rule No. 94, governing this Honorable Court.

Sixth. It appears by said bill that the plaintiff relies upon certain alleged contracts pretended to have been made by the City of Parkersburg, commuting the taxes and exempting from charge the property of the North Western Virginia R. R. Co. within the said City, whereas neither the town nor the City of Parkersburg has at any time been authorized to make such commutation of taxes, or to bargain away her power of taxation, and all attempted contracts in that regard are null and void.

Seventh. It appears from the said bill that the plaintiff claims that the property of the Parkersburg Branch R. R. Co. succeeds to the rights and franchises of the North Western Va. R. R. Co. by a sale of the property of the last named Company made in the year 1865, while under the law the Parkersburg Branch R. R. Co., which became a corporation at the time of such sale and conveyance in the year 1865, could not and did not take or hold any taxed exemption, the same being forbidden in West Virginia, and the new corporation being subject to Article 11, Section 5 of the Constitution of West Virginia adopted in 1865.

Eighth. The Parkersburg Branch R. R. Co. did not acquire any immunity from taxation under any contract made between the City of Parkersburg and the North Western Virginia R. R. Co. for two reasons: 1st, that the contract for immunity, if valid, was personal; and second, the contract for immunity did not pass as a franchise by virtue of the statute under which the Parkersburg Branch R. R. Co. came to be and secured the franchises, rights and privileges of the North Western R. R. Co., such immunity not being a franchise.

Ninth. The bill does not show that the property which has been taxed is the same property that was purchased from the North Western Virginia R. R. Co., or that the property which has been taxed is within the area and jurisdiction of the defendant, as such area existed at the time of the making of the alleged contracts.

Tenth. Every ordinance, resolution and contract alleged to have been made by this defendant are in law void for want of power to pass or to exact the same and confer any right upon the plaintiff.

[fol. 145] Eleventh. There is no equity in the bill.

Wherefore, and for divers other good causes of demurrer thereto bearing on said bill, this defendant doth demur thereto, and she prays the judgment of this Honorable Court whether she shall be compelled to make any answer to the said bill, and further humbly prays to be hence dismissed with her reasonable costs in this behalf sustained.

The City of Parkersburg, by Counsel. B. M. Ambler, of Counsel.

I, B. M. Ambler, Counsel, do hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

B. M. Ambler, of Counsel for City of Parkersburg.

Jurat showing the foregoing was duly sworn to by R. H. Thomas omitted in printing.

IN U. S. CIRCUIT COURT

[Title omitted]

DECREE OF OCTOBER 2, 1895

On this 2nd day of October, 1895, came the City of Parkersburg, [fol. 146] by Smith D. Turner, B. M. Ambler, its counsel, and the complainant, by John A. Hutchinson, its Counsel; and thereupon, the complainant moved the court injunctions as prayed by its Bill and by its amended and Supplemental Bill, filed in due cause, and the City of Parkersburg, by counsel, moved the court to dissolve and vacate the restraining orders and injunctions heretofore awarded in this cause; and the said city, defendants, relying upon its demurrer, heretofore filed to the original bill and upon its demurrer

filed at Rules to the amended and supplemental bill, but saving all rights to insist upon said demurrers, non tendered without prejudice to said demurrers, its answer heretofore filed to the original bill as its answer to the amended and supplemental bill to which answer plaintiff filed exceptions, the same heretofore filed to said answer and the defendant prayed that said answer be considered by the court upon said motions; and the matters arising upon the motions and demurrers aforesaid and upon the answer or exceptions thereto were agreed by counsel and submitted to the court and leave is given to either party to file written or printed briefs by the first day of December, next.

Nathan Goff, Circuit Judge.

Oct. 2, 1895.

IN U. S. CIRCUIT COURT

[Title omitted]

DECREE OVERRULING DEMURRER—Enter July 13, 1897

The Court having maturely considered the demurrers of the defendants heretofore filed by them in this cause to the original and amended and supplemental bill herein is of the opinion that the same are not well taken.

It is, therefore, adjudged, ordered and decreed that said demurrers and each of them, be, and the same are hereby, overruled.

And thereupon came the defendants and asked leave to file their [fol. 147] separate answers, heretofore tendered in this cause, to the original bill and the same being considered by the Court are ordered filed, and leave is given them to file answers to said amended and supplemental bill within thirty days from this date.

Nathan Goff, Circuit Judge.

July 13, 1897.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT
OF WEST VIRGINIA

[Title omitted]

ANSWER OF CITY OF PARKERSBURG TO AMENDED AND SUPPLEMENTAL
BILL—Filed Aug. 11, 1897

The separate answer of the City of Parkersburg to the amended and supplemental bill of complaint in equity exhibited against it and the said Dudley by the said Baltimore & Ohio Railroad Company.

This defendant, by protestation, not confessing the sufficiency of said bill or of the matters and things therein set forth, but saving unto itself all manner of benefit and advantage by way of objections, exceptions or other wise, to said bill, for answer to so much of said

bill as this respondent is advised it is proper or necessary to be answered unto, answers and says:

That respondent heretofore tendered and this Court on the — day of —, 1897, filed the answer of respondent to the original bill of complaint so that the same is now a part of the record in this cause, and respondent here reiterates the averments, charges and allegations of said answer and prays that the same may be made a part of this answer.

Further answering respondent says that it is not true that the [fol. 148] Town of Parkersburg in 1855 had the right to and was not prohibited from making the deed and contract with the Northwestern Railroad Company, as alleged in said amended and supplemental bill and that there was nothing in the Constitution or laws of the State of Virginia which in any way inhibited such transaction on the part of said parties and especially said town and that nothing in the constitution or laws of the State of West Virginia subsequently adopted or enacted after the making of said contract could in any wise alter or impair the validity of said contract or the obligation thereof.

Respondent further answering says that it is not true as is alleged in said bill that complainant has always paid all the taxes and assessments due from it in the County of Wood and State of West Virginia in and in the City of Parkersburg to which said City is entitled according to law; that it is not true that complainant is not bound to pay the sum of money, to-wit, the taxes for the years 1893 and 1894; that it is not true that said taxes were illegally imposed upon complainant's property or that complainant is not bound to pay the ten per centum charged upon said taxes; that it is not true that said 10% was illegally charged.

Respondent denies that it has violated or attempted to violate its covenants and agreements with complainant as the successor in the right and title of the Northwestern Railroad Company; it denies it is in bad faith, unjust, inequitable and fraudulent on the part of respondent to ignore the deed and agreement aforesaid made with the Northwestern Railroad Company.

Respondent denies that complainant can in any sense be regarded as the successor of the Northwestern Virginia Railroad Company as to be entitled under the deed and agreement aforesaid to the provisions and conditions thereof.

Respondent denies that it is fraud upon complainant to collect the taxes aforesaid and at the same time retain the property mentioned in said bill or the said money.

Respondent now having fully answered, prays to be hence dismissed with its reasonable costs in this behalf expended. And it will ever pray &c.

In witness whereof The City of Parkersburg has caused its corporate seal to be affixed and its corporate name to be signed hereunto by R. H. Thomas, its Mayor.

The City of Parkersburg, by R. H. Thomas, Mayor. (Seal.)
Smith D. Turner, of Counsel.

Jurat showing the foregoing was duly sworn to by R. H. Thomas omitted in printing.

ORDER ENTERED JANUARY 11, 1911

[Title omitted]

Upon request of counsel for defendants, it is ordered that W. H. Wolfe, Attorney for City of Parkersburg, be permitted to withdraw the file of papers in this cause for purpose of inspection, upon giving to Clerk of the Court the proper receipt therefor.

Entered January 11, 1911.

Alston G. Dayton, Judge.

January 14, 1911.

Received papers in above file.

W. H. Wolfe, Atty.

[fol. 150] IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ORDER ENTERED JANUARY 17, 1921

This day came the defendant, the City of Parkersburg, by counsel, and moved the Court to set aside the order heretofore entered in this cause on the 9th day of June, 1920, and reinstate said cause upon the docket of this Court for further proceedings.

And it appearing to the Court from the last order entered in said cause that the same was heretofore submitted to the Court upon the motion of the plaintiff to perpetuate a temporary injunction theretofore granted, and upon the motion of the defendant, the City of Parkersburg, to dissolve said temporary injunction, and that neither of said motions, so far as the record discloses, have been disposed of by the Court, and it being apparent to the Court from the statement of counsel for the defendant that this cause is one of importance and one which should not be disposed of without an adjudication of the matters involved therein, it is therefore adjudged, ordered and decreed that the order heretofore entered in this cause on the 9th day of June, 1920, be and the same is hereby set aside and annulled and this cause is reinstated upon the docket of this Court upon the equity side thereof.

It is further adjudged, ordered and decreed that the Clerk of this Court do forthwith notify counsel for the plaintiff company and also said company of the entry of this order.

And the Court being further of opinion that no other steps should be taken in this cause until counsel for the plaintiffs have been so notified, it is adjudged, ordered and decreed that this cause be and

the same is hereby continued until the next term of this Court at Parkersburg.

Enter January 17, 1921.

H. H. Watkins, Judge.

[fol. 151] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ORDER ENTERED JUNE 3, 1922

This 3rd day of June, 1922, came the City of Parkersburg, by its counsel, and as well came the plaintiff by its counsel, and thereupon the said The City of Parkersburg, by counsel, moved that this cause be set for hearing upon the exceptions of said plaintiff to the separate answers of the said The City of Parkersburg to the bills of complaint, which said exceptions were filed herein on the 22nd day of June, 1894, and the 2nd day of October, 1895, to which motion the said plaintiff objected, and, without waiving the said exceptions or its rights under the present equity rules to move to strike out from the said answers the portion thereof referred to in said exceptions, moved the Court to strike out the said answers, said objections and said motion being based upon the ground that the said The City of Parkersburg has acquiesced in the injunctions awarded herein on the 10th day of April, 1894, and the 16th day of August, 1895, and through the lapse of more than a quarter of a century has failed to take any action looking to the dissolution of the said injunction, and has long since abandoned its claim for the taxes, the collection of which was restrained by said injunctions, and has failed to do or offer to do equity herein, and for other reasons appearing in the record.

And thereupon this cause was submitted, upon the motions aforesaid. And leave is given counsel for plaintiff to file its brief on or before July 15, 1922, and counsel for defendant to file its brief on or before August 1st, 1922; and with further leave to counsel for plaintiff to file reply brief on or before August 10, 1922, in case it so desires.

Enter June 3, 1922.

W. E. Baker, Judge.

[fol. 152] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

MOTION OF CITY OF PARKERSBURG TO DISMISS—Filed January
10, 1923

To the above-named plaintiff:

You will take notice that on the calling of the trial docket of said Court, to be held at the January term, 1923, thereof, the defendant will move to dismiss this suit and to dissolve the preliminary injunctions heretofore awarded therein, for the following reasons:

First. Because the contract of June 8, 1855, entered into between the Town of Parkersburg and the Northwestern Virginia Railroad Company, in so far as it purported to exempt the property of said railroad company from town taxes and assessments, was ultra vires and void.

Second. Because, even if such an exemption had been effective, such immunity from taxation did not pass by foreclosure and sale to the Parkersburg Branch Railroad Company, or to the Baltimore & Ohio Railroad Company; that at all events the exemption became void on the dissolution of the beneficiary, the Northwestern Virginia Railroad Company.

Third. Because, the original act being void because ultra vires it could not be rendered effective or in force by subsequent acts of indulgence, acquiescence or ratification either express or implied.

Fourth. Because the act of exemption relied upon has none of the elements of a commutation of taxes and therefore there remain no equities to be adjusted or adjudicated.

[fol. 153] At which times and place you are respectfully cited to be present and show cause against said motion if any you can.

Yours truly, F. P. Moats, Robert B. McDougale, Counsel for
Plaintiff.

IN U. S. DISTRICT COURT

[Title omitted]

ORDER ENTERED FILING MOTION TO DISMISS—Entered January 10,
1923

This day the defendant, the City of Parkersburg, tendered its motion in writing to dismiss this suit and to dissolve the preliminary injunctions heretofore awarded herein, which is ordered filed.

Enter Jan. 10, 1923.

W. E. Baker, U. S. District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN
DISTRICT OF WEST VIRGINIA

[Title omitted]

FINAL ORDER—Entered February 7, 1923

This cause came on again this seventh day of February, 1923, to be heard upon all pleadings and papers filed herein and all orders [fol. 154] heretofore entered herein, as well as upon the several motions and objections tendered herein on the 3rd day of June, 1922, and appearing in the decree on that date entered, and as well upon the motion of the defendant, the City of Parkersburg, entered herein on January 10, 1923, to dismiss the suit and dissolve the preliminary injunctions heretofore awarded herein. And thereupon came the plaintiff, by counsel, and the defendant, The City of Parkersburg, by counsel. And the Court having read the briefs filed by counsel upon the matters submitted to the Court and having heard arguments of counsel upon said matters, is now of opinion to, and doth hereby adjudge, order and decrees as follows:

It is adjudged, ordered and decreed that the plaintiff's objection to the defendant's motion entered herein on the 3rd day of June, 1922, that this cause be set for hearing upon the exceptions of the plaintiff to the separate answers of the said The City of Parkersburg, to the bills of complaint, which said exceptions were filed herein on the 22nd day of June, 1894, and the 2nd day of October, 1895, be and the same is hereby sustained, and the Court doth decline to set the cause for hearing upon the said exceptions; and it is further adjudged, ordered and decreed that the motion of the plaintiff, The Baltimore & Ohio Railroad Company, entered herein on the said 3rd day of June, 1922, that the said separate answers of the said The City of Parkersburg, be stricken out, be and the same hereby is sustained; and it is further adjudged, ordered and decreed that the said motion of the defendant, The City of Parkersburg, entered herein on the 10th day of January, 1923, to dismiss the suit and dissolve the preliminary injunction heretofore awarded herein, be and the same is hereby overruled.

And now the said plaintiff, The Baltimore & Ohio Railroad Company doth move for a permanent injunction against the said defendant as prayed for in said original bill of complaint and the said amended and supplemental bill of complaint, which motion the Court doth sustain.

It is therefore now adjudged, ordered and decreed that the said separate answers filed herein by the said defendant, The City of [fol. 155] Parkersburg, be and the same hereby are, stricken from the record; and it is further adjudged, ordered and decreed that the preliminary injunctions awarded herein respectively on the 10th day of April, 1894, and on the 19th day of August, 1895, be and the same are hereby *are* made permanent, and that the plaintiff recover

from the defendant, The City of Parkersburg, the costs by it in this behalf expended.

And now by direction of the Court and by agreement of the parties, it is ordered that the briefs submitted upon the original hearing of said cause by John A. Hutchinson on behalf of the plaintiff, and by Laird & Turner on behalf of the defendant, The City of Parkersburg, be and the same are hereby made a part of the record in this cause.

W. E. Baker, Judge.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT
OF WEST VIRGINIA

[Title omitted]

BRIEF ON ORIGINAL HEARING FILED BY JOHN A. HUTCHINSON,
COUNSEL FOR B. & O. R. R. Co.—Filed Feb. 9. 1923

Brief of Counsel for Plaintiff upon Demurrer to the Bill Filed by the
City of Parkersburg

This case has been argued and submitted upon demurrer to the bill. This demurrer admits all allegations and matters properly pleaded to be true, as set forth in the bill. In order to understand the case as presented by the bill, which it is unnecessary to quote at large in this brief, we will premise by stating briefly a history of the case.

The Town of Parkersburg was first incorporated by and Act [fol. 156] passed by the General Assembly of Virginia, January 22, 1920. The section section of that act provides that the President, Recorder and Trustees elected and their successors in office shall be and are hereby made a body politic and corporate by the name of President, Recorder and Trustees of the Town of Parkersburg, and by the name aforesaid, shall have capacity to purchase, receive, possess and convey any real estate for the use of said town, &c. The third section of that Act, amongst other things, provides that the President, Recorder and Trustees of the town shall have certain powers. Amongst these powers, "they shall have the power to pass such by-laws and ordinances for the regulation and improvement of the streets and public landings, &c., and for such other purposes as they may deem necessary for the internal safety and convenience of said town and the inhabitants thereof."

This first charter of Parkersburg was padded while the constitution of Virginia of 1776, adopted June 29 of that year, was in force. As will be seen on looking into that constitution, no restriction or limitation was put upon the powers of the General Assembly in passing any acts relating to corporation, or upon the subject of taxation. Prior to the adoption of that constitution, but strictly in harmony with it, the towns and villages of Virginia were in the nature free cities, and possessed legislative power and full control over

their inhabitants, subject only to such qualifications and conditions as might exist under any *orval* patent or charter granted to any city or town. Under the constitution of 1776, and under the custom and usage of towns and cities incorporated under that constitution by the General Assembly of Virginia, it will be found that scarcely any restrictions were placed upon the powers of such corporation. Among the objects for which towns were incorporated, those most ancient, best established by authority and most obvious are those relating to commerce, trade and public improvement. Whatever has connection with commerce, domestic or foreign, has direct connection with and relation to the interest of incorporated town-. Wilcock on Corporation 17. There was no amendment to this first act incorporating the Town of Parkersburg, until that passed January 17, 1826, which does not concern the matter before us. The next act was that passed March 26, 1842, which is not [fol. 157] material at this time, upon any question raised by the demurrer. By the act passed March 17, 1851, extending the corporate limits of the Town of Parkersburg, by the second section thereof, the President, Recorder and Trustees of the Town were authorized to subscribe for, not exceeding two-fifths of the capital stock of any joint stock company, incorporated for the purpose of constructing any work of internal improvement, to pass through, by or terminating at or near the said town, and to borrow money for the purpose of paying such subscription, and from time to time to appoint a proxy to represent their stock in the meeting of the stockholders of such company, &c.

At the same session of the General Assembly of Virginia, at which this amendment to the charter of the town of March 18, 1851, was enacted, the General Assembly, on the 14th day of February, 1851, passed an act entitled, An act to incorporate the North Western Virginia Railroad Company, which is found printed in the session acts of Virginia of 1850-1851, pages 69 and 70. It was evidently the purpose of the General Assembly in passing the act of March, 1851, amending the charter of the town of Parkersburg, to authorize the town to subscribe for stock, and thereby give municipal aid to the construction of the North Western Virginia Railroad, which had passed thirty days before by the Act last referred to.

The question that is first raised by the demurrer, is in regard to the authority of the town to make the contract of June 8, 1855, by which the town in consideration of certain conveyances of real estate, agreed to exempt or release from taxation certain property of the Northwestern Virginia Railroad Company. To understand this question, a little more of the history of the case must be given.

The Northwestern Virginia Railroad Company was organized under its said charter, and *proceeding* to construct its road from Parkersburg to Grafton in the County of Taylor. By section 4 of said charter, the railroad company was authorized to increase its capital stock and to borrow money for the purpose of carrying on the object of its creation and to pledge the property of the company for the payment of the same. At that time, no company, under the Code of Virginia of 1849, had power to borrow money, except

under certain conditions (Chap. 61, section 26), unless expressly [fol. 158] authorized by its charter. By section- 27 and 28 of chapter 61 of the Code of 1849, which was in force at the time the charter of the North Western Virginia Railroad Company was enacted, all the property of the company subject to sale and sold under deed of trust or mortgage, would pass to the purchaser at the sale, not only the works and property of the company as they were at the time of the making of the deed of trust or mortgage, but any works which the company might after that time and before the sale have construed, and all other property of which it may be possessed at the time of the sale, &c. On the 21st day of March, 1853, the Northwestern Virginia Railroad Company, in order to acquire the necessary means to construct its road, and acting under the authority given it by its charter, executed a deed of trust or mortgage, to the Mayor and City of Baltimore on all its then present and future property in order to secure certain bonds amounting to the sum of \$1,500.00, which were guaranteed by the *the* Mayor of the City of Baltimore; and also on the same day, to-wit: the 21st day of March, 1853, it executed to the Baltimore & Ohio Railroad Company, and subject to the first mortgage, a second mortgage to secure \$1,000,000 in the bonds of the Northwestern Virginia Railroad Company, which latter bonds were guaranteed by the Baltimore & Ohio Railroad Company; copies of which mortgages are filed with the bill and exhibits in this case. By these mortgages the property and works of every kind and description of the company were included and conveyed, in trust, for the purpose of said mortgages, not only that which it then owned and controlled, but such as it thereafter acquired, according to the express letter of the statutes of Virginia at that time in force.

The Town of Parkersburg subscribed to the stock of the Northwestern Virginia Railroad Company as provided for — its amended charter of March, 1851, above referred to, and thereby became a stockholder in the capital stock of the Northwestern Virginia Railroad Company. The town had full knowledge, of course, of the existence of the charter of the Northwestern Virginia Railroad Company, of the provisions of the Code of 1849, Chapter 61, and of the fact that said mortgages were made and recorded, upon the property and works of the Northwestern Virginia Railroad Company; in fact, the town, as a stockholder of the Northwestern Virginia Railroad [fol. 159] Railroad Company, gave authority to the Board of Directors of the said railroad company to execute said mortgages, and as such stockholder, it is held to be bound by all the acts and transactions of the said Northwestern Virginia Railroad Company, as much so as any private individual stockholder. It does not, therefore, appear before this court as a stranger to these transactions. It has had all its rights, in the management of the Northwestern Virginia Railroad Company's affairs, as any other stockholder could or might have, according to the number and shares it held in such company, and must be held to be bound by every act of the Northwestern

Virginia Railroad Company, contained within the limits of its charter rights and privileges.

After the execution of said mortgages, to-wit: on the 13th day of March, 1854, John J. Jackson and others by deed conveyed to the Northwestern Virginia Railroad Company, certain real estate along and upon the banks and shores of the Ohio and Little Kanawha rivers in the Town of Parkersburg, with wharf rights and privileges in consideration of the sum of money named in the deed, which land and rights and privileges were of great value; copy of the deed is filed with it, marked exhibit "C." It will be seen by the original charter of the Town of Parkersburg, passed January 22, 1920, section 6, that the rights and interest of individuals in and to the shores and banks of the Ohio and Little Kanawha rivers along the front of the town, were in no wise affected by the passage of the act incorporating said town; that such rights and interests were to remain in full force in the individuals then owning the same. These rights and interests referred to in this section 6 were part of the same estate conveyed March 13, 1854, last referred to.

In further exposition of the history of this matter, on the 8th day of June, 1855, the Town of Parkersburg, desiring to further the interests of this public improvement by the construction of the Northwestern Virginia Railroad Company under its charter, believing it to be to the best interests of the town to enter into the contract hereinafter mentioned, and, in order to induce said railroad company to make the town its actual terminus, and, to carry out the purpose of statutes in such case made and provided by the second section of the act of March 17, 1851, above referred to, whereby municipal [fol. 160] aid is authorized to be given to any work of internal improvement passing through, near by or in said town; the President, Recorder and Trustees of the Town of Parkersburg entered into a written contract with said railroad company, in accordance with the terms and conditions set forth in the record and proceedings of said town, a copy of which is filed with the record of this case and appears on pages 256 to 259, inclusive, of the printed ordinances of the Town of Parkersburg. By the virtue of these proceedings, at which certain resolutions were adopted unanimously, it was resolved that the president of the town be authorized and directed to execute and deliver to the Northwestern Virginia Railroad Company on behalf of the town, a deed or deeds, to be approved by the council of the town, to carry into effect the stipulations which had been assented to by the president of the railroad company, subject to the ratification of the Board of directors, and which were assented to by the council of said town. Then follow six different provisions, amongst which was the agreement on the part of the town to grant to the railroad company certain free use of the land, bank, shores and other rights included within certain boundaries, and the right to and including certain streets and alleys of the town. And amongst other things, in consideration of the stipulations and agreements of the company, the town agreed that "all the property of the company within the town, while the same continues to be used

by them for or is appropriated to the business of the road, should be free from all town taxes and assessments, and that all privileges granted or secured to the company, should apply as well to property and rights thereafter acquired by them, as those they now own or possess." It will be seen that the deed of June 8, 1855, which was executed to carry into effect the said contracts, embodied in effect the resolutions of the town of Parkersburg, and thereby granted for valuable consideration the rights and privileges, franchises and exemptions, thus expressly conferred upon the Northwestern Virginia Railroad Company and its successors within the jurisdiction of the town of Parkersburg. In other words, by the deed the town granted and covenanted with the railroad company that all the property owned, used or occupied by that company or its successors within the town, so long as the said property should be [fol.161] owned, used or appropriated by them (meaning the said company or its successors), or connected with the business of their road, should be free from all town taxes, assessments and charges, and that all the privileges thereby granted and assured to the parties of the second part, meaning the Northwestern Virginia Railroad Company, should apply as fully to property and rights thereafter acquired, used or occupied within the said town and its jurisdiction as to those they then owned, used or occupied or might thereafter acquire, use or occupy, &c. It will further appear by said deed that in consideration of these several grants, covenants and stipulations on the part of the town, and in consideration of the exemption from town taxes, assessments and charges, said railroad company granted and conveyed to the town and its successors, all the right, title and interest and estate conveyed to the railroad company by the deed from John J. Jackson and others, of record in Wood County, to the use and residue of all the lands, banks and shores described in the deed, with the water rights and appurtenances thereto belonging, to be used exclusively for wharves, landings and other purposes connected with the use of the Ohio and Little Kanawha rivers. See exhibit "E" with the bill in this case.

It further appears that at a regular meeting of the city council of the town on the 13th day of July, 1855, report was made by the president of the town council, that the deed of June 8, 1855, had been executed on the part of the town and on the part of the railroad company, each conveying to the other their interest in certain portions of the river banks and other rights and privileges according to the resolutions adopted June 8th, 1855, and that the deed had been recorded in the Clerk's office of the county court of Wood county. A copy of these minutes of the said meeting is filed with the bill marked exhibit "F."

It further appears by the bill in this case that the railroad company at the time of the execution of that deed and after that time had acquired certain town lots in Parkersburg, which it had appropriated to the use and business of its road and its operation thereof, and that since the date of said deed it has acquired other lands and property in said town for the purpose of its railroad business, used in connec-

[fol. 162] tion with its business, and which by the terms of the said deed and contract, were to be free of all town assessments, taxation and charges.

It will be seen and it is admitted, that the deeds of trust and mortgages of March 21, 1853, were foreclosed in the month of February, 1865, by a sale of all the lands, property, works and interests of the Northwestern Virginia Railroad Company in accordance with the provisions of the Code of Virginia in 1849.

At the sale, the Baltimore & Ohio Railroad Company being not only a guarantor on the bonds of the Northwestern Virginia Railroad Company, but also a creditor otherwise, became the purchaser of all the works and property sold under said foreclosure proceedings, subject to the first mortgage, and it thereby became entitled as purchaser under the deed made by the trustee, to all of said property and works, both that property which was owned at the time of the trust or mortgage was made, in 1853, but, according to the Code and laws at the time of the sale belonging to the Northwestern Virginia Railroad Company. The sale was made under the first mortgage, as shown by the bill. By the provisions of chapter 61, of the Code of 1860, the purchaser of the works of an internal improvement company had the right to continue the operation of the railroad under any name that he might give, and the Baltimore & Ohio Railroad Company, being the purchaser, declared that it would continue the business under the name of the Parkersburg Branch Railroad Company, which it did as stated in the deed of conveyance to it. It further appears that the charter of the Town of Parkersburg was extended and its boundaries enlarged in 1860. On the 30th day of May, 1865, the Mayor and council of Parkersburg passed an ordinance authorizing the extension of the Parkersburg Branch Railroad through the city to the Ohio river. The third section of that ordinance declares the deed of the 8th day of June, 1855, and all ordinances or parts of ordinances passed by the town and accepted by the Northwestern Virginia Railroad Company to be in full force and binding on the town of Parkersburg and the Parkersburg Branch Railroad Company as the successors of the parties to the said deed and the said ordinances, a copy of the third section of the said ordinance which relates to the matter in hand, is filed with the bill, marked "G." It also appears [fol. 163] that on the 28th day of February, 1865, the legislature of West Virginia passed an act authorizing certain railroad companies to purchase and hold real estate in the city of Parkersburg, in Wood County. This act authorized the Baltimore & Ohio Railroad Company, the Northwestern Virginia Railroad Company and the Marietta & Cincinnati Railroad Company, or any of them, or any railroad company connected with any of the above named companies, or which may become the purchaser or purchasers of the Northwestern Virginia Railroad to purchase and hold certain real estate, buying lands mentioned in the act, being the same property held by the Northwestern Virginia Railroad Company known as the Central Depot, together with other real estate in Wood County not exceeding 20 acres, &c.

On the 10th of May, 1867, the mayor and council of the city of

Parkersburg passed another ordinance in relation to the Parkersburg Branch Railroad, entitled an ordinance to widen Washington street, the third section of which reiterates the confirmation of the deed and contract of June 8th, 1855, and all ordinances, parts of ordinances were declared to be in full force and binding on the city of Parkersburg and the successors of the Northwestern Virginia Railroad Company. In that section also it was provided that the Parkersburg Branch Railroad Company, which was the successor and creature of the Baltimore & Ohio Railroad Company, should, without unnecessary delay, proceed to the construction of a wharf at the foot of court square on the Ohio river in said city, and complete the same at the costs and charges of the company on or before the first day of December, 1868. On the 15th day of March, 1870, the mayor and council of Parkersburg passed another ordinance to amend and re-enact the ordinance passed May 10, 1867, &c. The first section of this ordinance provides that if the Parkersburg Branch Railroad Company, aforesaid, should, within thirty days from and after the passage of that ordinance, pay to the city of Parkersburg the sum of \$7,500.00, it would be received as a performance and discharge of the terms and conditions of the 4th section of the ordinance passed May 10, 1867. Now the fact is, the Baltimore & Ohio Railroad Company, under the name of the Parkersburg Branch Railroad Company, the latter having no funds, and no income, paid to the City of Parkersburg, the sum of \$7,500.00 in full discharge and performance of the contract of June 8, 1855, relating to the completion of the wharf at the foot of Court street, on the Ohio river; the city accepted the said payment as performance of part of the contract of June 8, 1856, a contract made with the Northwestern Virginia Railroad Company, thereby recognizing the validity of the said contract and accepting the sum of \$7,500.00 of the plaintiff, the Baltimore & Ohio Railroad Company, the owner of the property of the Northwestern Virginia Railroad Company, as hereinbefore shown.

If the contract of June 8, 1855, was valid when it was made, it was no less valid when it was performed by the successor of the Northwestern Virginia Railroad Company, it being expressly made by the terms of the deed binding on the successors, both of the town and of the railroad company. If the contract is valid, as it evidently is, all the property of the Northwestern Virginia Railroad Co. purchased in February, 1865, by the Baltimore & Ohio Railroad Company, was made free and clear of taxes, assessments and charges. By this payment in 1870 of \$7,500.00, so much of this exemption of taxation was commuted by the payment of the sum of \$7,500.00 into the treasury of the State.

The foregoing statement fairly brings us to the question at issue on this demurrer. It is not the question which is so elaborately discussed by the counsel for the city in its printed brief; it is a clear and more distinct proposition, standing independent and alone of all other like questions. It involves the powers of the municipal corporation, made under a charter of the town of Parkersburg, granted under a constitution entirely unique and different from any subsequent constitution of Virginia or West Virginia. No limitation or

restriction upon the powers of municipal corporation or upon the power of taxation was contained in the constitution of Virginia of 1776. See first Revised Code, 1819.

Two propositions are maintained by the plaintiff, under the charter of the Town of Parkersburg as it existed at the time this contract and deed of June 8 was made.

First. The President, Recorder and Trustees of the Town of Parkersburg had full power to purchase, receive, possess and convey any real or personal estate for the use of the town.

Second. The town had full power to pass any by-laws and ordinances for the improvement of the town for such other purposes as they might deem necessary for the internal safety and convenience of the town and the inhabitants thereof, provided such by-laws and ordinances were not contrary to the laws and constitution of the State of Virginia or of the United States.

What is meant by the phrase in the third section of the charter of 1820, "power to pass such by-laws and ordinances for such other purposes as they may deem necessary for the internal safety and convenience of the town?" Is there any discretion lodged there? It is to be argued that there is any restriction upon the town authorities under the charter of 1820, which was in force at the time this contract was made, which restriction of the authorities of the town as to the passage of any by-law or ordinance concerning the internal safety and convenience of the town? When it is said in the charter of the municipal corporation or any grant of power, that it is to be executed in such wise as may be deemed necessary, it places the whole power in the discretion of the appointee of the power. There was no imperative requirement on the part of the town to pass any by-laws. Whatever they sought or deemed necessary for the internal safety or convenience of the town or its inhabitants, the trustees, recorder and president of the town might pass.

King v. The Mayor, 2 Barn. & Cres., 584.

Commonwealth v. Commissioners, 5 Binney, 536.

People v. Supreme Court, 5 Wend. 125.

By the use of the language in the charter of the town of 1820, "they shall have power to pass such by-laws and ordinances for such purposes as they may deem necessary for the internal safety and convenience of the said town and the inhabitants thereof." It is plain the legislature conferred discretionary power upon the town authorities. Whatever in their wisdom they concluded necessary 'e., it was [fol. 166] in their power to enact, if such enactment did not contravene the constitution of the State or of the United States.

No particular method of providing for the internal safety or convenience of the town is defined or pointed at, and, therefore, there is no imperative duty to adopt one mode rather than another, but the entire scheme of what was proper and convenient for the town was delegated to the president, recorder and trustees of the town.

Steins v. Franklin County, 48 Missouri 167.

Mayor v. Furze, 3 Hill 612.

At the time the deed of June 8, 1855, was executed there was no provision in the constitution of Virginia, and nothing in the charter of the town that prohibited the making of such a deed; full discretionary power having been given by the charter of 1820 to the Town of Parkersburg. It had the right in exercising its judgment to make such contract with the railroad company. The legislature of Virginia had never passed any act prohibiting the exercise of such power by municipal corporations. There is nothing in the constitution or laws of Virginia at that time that provided, as the constitution of West Virginia now does, for equal and uniform taxation.

In the absence of constitutional restriction, the legislature may confer upon the municipalities such powers and in such measures as it deems expedient.

Alexander v. Baltimore, 5 Gill (Md.) 385.

North Missouri R. R. Co. v. McGuire, 44 Missouri. 490.

The power of making contracts, unless restricted by the organic law or by general legislation of the State, exists in municipal corporations. This power of making contracts is essential to the existence and proper exercise of other powers conferred upon the corporation. It is like the power of taxation. As has been said, the Supreme Court of the United States, when a municipal corporation is created, the power of taxation is vested in it as an essential attribute for all the purposes of its existence, unless by express terms prohibited.

Per Justice Field in United States v. New Orleans, 98 U. S. 393.

[fol. 167] The authority conferred by the charter upon the town of Parkersburg to pay all by-laws and ordinances it may deem necessary for the safety and convenience of the town is so general, and grants such a wide discretion as to the nature and limitations in the exercise of such powers, that it can not be declared as absolutely true in any sense that the town did not have the power to make the contract and deed of June 8, 1855.

This is urged because the constitution of Virginia did not, nor did any general law of that State, nor did any provision of the charter of the town, at the time said deed was executed, prohibit the exercise of such power either expressly or by implication. The construction is insisted upon because, in the cases so much relied upon by the counsel for the defendant in opposition to the exercise of this power, it will be found that there were constitutional provisions limiting the exercise of the power, or there were restrictions in the charter of the corporation prohibiting the making of any such contract.

It will be found on investigation that there was express or necessarily implied limitation upon the exercise of such powers; in fact, in all of the cases cited by counsel for the defendant, in their brief upon this question. A distinction also must be noted between cases where the question of assessment or taxation has arisen upon statutes or ordinances relating to local assessments or the improvement of streets by paving or otherwise.

This authority can only exist by express legislative enactment, while the general power to tax for general purposes or the power to make contracts on the part of the city is derived from the nature and charter of the corporation itself, under the provisions of the constitution of the State, at the time the power is exercised.

The first proposition of the counsel for defendant, is: "A municipal corporation has no power to do any act, except those granted by express words in its charter, or by general statute under which it is created; and those essential to the declared purposes of the corporation, not simply convenient but indispensable." For this

Gas C. v. Parkersburg, 30 W. Va. 439.

Charleston v. Reed, 27 W. Va. 681.

1 Dillon Mun. Corp., Sec. 89.

[fol. 168] 1 Beach Pub. Corp., Sec. 538, are cited.

But the first case cited is not correctly quoted, and the proposition is therefore sustained by the authorities cited.

The cautious counsel discreetly omit these words in the opinion of the court in Gas Co. v. Parkersburg, supra, p. 439, which is taken from 1 Dil. Mun. Corp., sec. 89, "second, those necessarily or fairly implied in or incident to the powers expressly granted."

By omitting this important clause from the text of Judge Dillon as endorsed by the Supreme Court of Appeals of West Virginia, counsel would be understood as disagreeing with these authorities and insisting upon a more vigorous definition of powers.

By the charter of 1820 of the Town of Parkersburg expressly grants powers which justify the ordinance and contract in question. It grants authority to pass any by-law or ordinance which it may deem necessary for two principal objects. (1) The internal safety of the town, (2) the "Convenience" of the town. So, here is an express exception made by the General Assembly of Virginia to the general rule laid down by Judge Dillon. The court in Gas Co. v. Parkersburg, supra, p. 439, recognizes the existence of three classes of powers of a municipal body.

1. Powers expressly granted.
2. Powers necessarily or fairly implied.
3. Powers essential to declared objects and purposes not simply convenient."

The charter of 1820 of Parkersburg grants express powers fully up to the measure exercised, and it is one of the declared objects and purposes of this charter that the town might pass by-laws or make contracts for the convenience of the town and its inhabitants.

No text cited, no text book quoted by counsel for defense meets this plain unambiguous provision of the charter.

Here there is no doubt of the legislative intention. The authority [fol. 169] is expressly granted, and the mode in which it is to be exercised directed.

The case of Charleston v. Reed, 27 W. Va. 681, is of — der the

charter of Parkersburg of March, 1860, chap. 200, Acts 1860, p. 354. The question was as to the power of the city to grant an exclusive franchise for the use of the streets.

The case of *Charleston v. Reed*, 27 W. Va. 681, is of no value here except as correctly quoting the language of Judge Dillon above cited.

The case of *Probasco v. Moundsville*, 11 W. Va. 501, is not an authority on the question here. That was a case where it was claimed that the power of exemption had been exercised, and therefore the exemption was irrevocable. But there being no contract, subsequent legislation repealed the power of exemption.

Powell v. Parkersburg, 28 W. Va. 698, has no bearing on this case, favorable to the pretensions of the defendant. It involved the construction of the charter of Parkersburg as amended by the act of November, 1863, which was enacted under the provisions and limitations of the constitution of W. Va. of 1863, June 20. But that case affirms what had been held in *Douglas v. Harrisville*, 9 W. Va., 162, that the first section of article VIII of the constitution of 1863, and the first section of article X, constitution of 1872, do not apply to counties, cities, towns, &c., pp. 706-708.

Nothing in any of these cases from the Court of Appeals of West Virginia involves the precise and distinct question here, when we have a contract and deed for valuable consideration, relieving the party from taxation; which when entered into were not in any manner prohibited by statute or constitution of the State.

The case of *Whiting v. West Point*, 14 S. E. Rep. 698, is adduced by the defendant's counsel in support of what they call the "West Virginia Rule."

This is a Virginia decision, made under the constitution adopted in 1878. It was the decision of a divided court, two able judges dissenting.

It had been several times held by the Court of Appeals of Virginia, by judges as able as the judges who sat in *Whiting v. West Point*, that municipal corporation could exempt property from taxation.

Thus in *Danville v. Shelton*, 76 Va. 325, it was held that the council [fol. 170] of the town of Danville, in Virginia, could exercise the power of exemption, p. 334. "This question," the Court says, "was thoroughly considered in *Williamson v. Massey*, 33 Gratt. 237. In *City of Richmond v. R. & D. R'y. Co.*, 21 Gratt. 604, Judge Staples delivered the opinion of the court, in which Moncure and Christian, *jj.*, concurred." In this opinion, speaking of the policy which had been illustrated in Virginia, it is said: "The construction of the railroad had greatly contributed to the gratifying results of increased wealth and population to the city. Its beneficent influences as a public improvement are commented on and the effect of the exemption enabled both the city and the railroad to develop and increase resources." - In another place Judge Staples says, p. 614: "An enlightened policy, appreciating these advances, invites the investment of capital in such enterprises by granting liberal exemptions from taxation."

See opinion in *Williamson v. Massey*, 33 Gratt. 237.

So, we perceive there is nothing in the opinion in *Whiting v. West Point*, 14 S. E. Rep. 788, that concludes or persuades against us; the former decisions not being overruled by a full court.

For a most elaborate and instructive opinion on the general subject of the power of municipal corporations in aiding works of internal improvement, see *Commissioners v. Miller*, 12 Am. Rep. 425. On page 438 is given the decisions of all the States bearing on the question, up to that time.

It is argued that, as the general rule is "a municipal corporation can not exempt property from taxation, it is incapable at any time or under any circumstances to do this." This we have seen, already, is not the law.

In determining whether such capacity exists, recurrence must be made to the state of the law at the time the contract of exemption was entered into.

When the deed of June 8, 1855, was executed, the charter of the town of Parkersburg of January 22, 1820, was in operation. No change had been made from that time to 1860, in relation to this subject in the charter of the town.

The constitution of Virginia, which was ratified Oct. 4, 1851, and [fol. 171] took effect January, 1852, contained no provision inimical to the exercise of the power contended for, and which was exercised by the making of the contract and execution of the deed of June 8, 1855.

That constitution contained no article or clause in relation to the subject of taxation by municipal corporations. It provided nothing in respect to local taxation or levies. Sections 22 to 31, inclusive, of article IV, concerned State taxation alone.

The requirement in section 22 of "equality and uniformity," referred alone to State taxation.

Douglas v. Harrisville, 9 W. Va. 162.

Powell v. Parkersburg, 28 Id. 706.

Gilkeson v. Justice, 13 Gratt. 577.

Norfolk v. Ellis, 26 Id. 224.

Langhorne v. Scott, 20 Id. 661.

All these cases, and especially those in Virginia, decided under the constitution of 1851, confirm this construction.

This being settled, there was nothing, either in the Constitution or laws of Virginia in 1855 that stood in the way of the town making the contract and grant of 1855.

It is unnecessary, therefore, to pursue the analysis of the many cases cited by the defendant's counsel, because they were founded upon a different state of facts, and arose under constitutional provisions and legislation entirely unlike the one before us.

The case of *Austin v. Coal Company*, 7 S. W. Rep. 200, *State v. Hannibal R. R.*, 75 Mo. 209, cited by defendant's counsel, were decided under the constitutional systems of Louisiana and Missouri, which expressly prohibited exemption, and made the rule of equality and uniformity apply to municipal taxation. Such cases are not pertinent nor authority in any respect here.

"But it is claimed that "where the power to exempt does not exist, neither does the power to commute." This is not supported by any authority; 1 *Desty on Taxation*, 145, does not sanction it. *Desty* says: "the power to commute is forbidden by the denial of the power to exempt." An entirely different proposition. Thus, we again see with how much freedom our friends in their printed brief deal with the terms of the authorities.

[fol. 172] There was no denial of the power to commute, nor of the power to exempt in any constitutional or legislative provision in force in Virginia in 1853, at the time the deed in question was made.

Commutation of taxes or purchase of exemption from taxation was never forbidden in Virginia, and it is not obnoxious to the rule of equality and uniformity.

State v. Bank, 5 Ill. 303.

R. R. Co. v. McLean Co., 17 Ill. 291.

United R. Co. v. Com'rs, 37 N. J. Law Rep. 240.

The right to make exemptions is involved in the right to select the subjects of taxation, and to apportion the public burdens among them.

A municipality, having unlimited right to impose burdens for the welfare, safety and convenience of its inhabitants, has the right to make the selections of the subject of taxation, and apportion the public burden as it may, in its wisdom, deem best. Here there is no denial of this right in the constitution or general laws or the charter of the municipality. Unless restrained by the constitution, there is no reason why a municipal corporation may not be invested with this power.

We have shown that under the constitution as construed by the Supreme Court of Virginia, in the case cited, the requirement of equality and uniformity had no application to cities, towns and villages, therefore the legislature, in conferring charter powers upon a town, might do this in an ample manner, as it did. Power to contract, power to provide for the safety and convenience of the town, is clearly given; unlimited except in the discretion of the authorities of the town.

It has been well settled that the council of the town is a legislative body. That the charter of the town is the constitution, of its existence; by the terms of its constitution, or charter, the council or legislative body of the town may enact such by-laws or ordinances, as it may deem proper; provided, they are not in conflict with the constitution of the State of the United States.

It has been held in several of the States that cities may make exceptions from taxation in consideration of public services and public convenience. This is expressly held in *Athens v. Long*, 54 Georgia [fol. 173] 330; *Waring v. Savannah*, 60 Georgia 93. In *Grant v. Davenport*, 36 Iowa, a city made an exemption from taxation in consideration that a water supply company would furnish the city with water. See

New Jersey v. Yard, 95 U. S. 104;

Farrington v. Tennessee, 95 U. S. 679;

Cooley Const. Limit. 337.

In the case of *Stein v. City of Mobile*, 49 Ala. 362, the city of Mobile made a contract whereby it was agreed that Stein should erect and carry on water works in the city without let, molestation or hindrance on the part of the city, and should have exclusive privilege of supplying water to the city. The city afterwards passed an ordinance imposing a license tax on Stein for carrying on the business. The Supreme Court held that the tax was invalid as it impaired the obligation on the contract the city had made with Stein. In that case the Chief Justice delivering the opinion of the court holds, that the contract having been made, was binding and valid on the city and it could not revoke the grant made, nor obstruct the full enjoyment of the privileges secured by it. It also held that a city can not pass any by-laws or ordinances which impair the obligation of contracts. Citing *Angell & Ames on Corp.*, secs. 18, 332, 33, &c.; *Cooley on Constitutional Limitations* 192-198. See also

Major v. Second Avenue R. R. Co., 32 N. Y. 261.

It is claimed in the brief of opposite counsel that the amendment to the charter of 1826, section 3, required the town to levy upon all the real estate and personal property within its limits, &c. Upon examination of that section, the court will observe that it relates to the power to improve streets and alleys, and to remove nuisances, such as affect the health of the inhabitants. This was the special purpose of this provision and whether necessary or not, it was, if the argument of counsel for defendant is correct, a strict limitation on the power, and the taxation must be confined to this proposition alone. If this be true, it proves too much, for according to this argument, the town never had any authority to levy taxes except to improve streets and alleys and to remove nuisances. According to this argument they had no power to levy and collect taxes for the support of the government of the town, or provide for the internal safety and convenience of the town, &c., and yet by the amendment of the act passed March 26, 1842, it will be observed that provision is made for the collection of taxes by the authorities of the town.

As to the power of the town to make contracts, where the provisions are not definitive or prohibitive, the authority to make contracts is an attribute of the town for all corporate purposes and the extent of the power is to be determined by the general scope and character of the charter and the laws in existence governing that subject under the statute. There is an implied and incidental authority in every municipality to make contracts of a certain character and to a certain extent. Under this general authority, contracts have been made for water works and gas works, for building sidewalks, for lighting streets and various other purposes, which time and progress have developed as necessary for the convenience and safety of the corporation and the inhabitants thereof. Implied authority exists in a corporation in many instances to make contracts, and this implied authority is coextensive with the powers and duties of the corporation; See

Coldwater v. Tucker, 24 Am. Rep. 601;

Jackson v. Bowman, 39 Miss. 671;

Dillon on Corp., sections 446-447.

If the power to make the contract in question existed on the part of the town, as we contend, then there is no doubt about the intention of the town to exempt the property of the railroad company from taxation, and this intention is clear beyond any reasonable doubt. So agree the authorities cited by defendant's counsel, upon the proposition that it must appear clear, and that no presumption can be indulged in favor of it. For, if the power did not exist at all to make the contract, it becomes immaterial to inquire what the intention was, or to indulge in presumptions.

It is argued, in the next place, that the contract and conveyance in question was void, because forbidden by public policy and existing [fol. 175] statutes. We have shown that by the decision of Virginia, under the constitution of 1851, this policy was sanctioned, and no doubt there are many special acts incorporating towns and villages in Virginia, which, if looked into, will sustain this assertion, that it was the policy of Virginia to confer power upon its municipal corporations for the purpose of their development and convenience and safety.

It is hardly worth while again to insist that the cases cited by counsel for defendant from 11 W. Va., 28 Va., and 32 W. Va., have no pertinency to the case at bar, and settled no question in conflict with the claims of the plaintiff here.

The second proposition of the defendant's counsel is this: "That if the attempted exemption of 1855 were valid, it was personal to the Northwestern Virginia Railroad Company, and did not follow the mortgages."

In support of this, several cases in the Supreme Court of the United States are referred to, in which it is held in various ways that the immunity from taxation of a railroad corporation does not pass to a purchaser of its property at a foreclosure sale. This is generally true, and if this were a case of the kind, there would be no difficulty in adding to the list of authorities in support of so general a proposition as this. But when these are examined, they will be found to be cases where the charter of a railroad company without consideration, contained an immunity from taxation. They have no application to a case of a contract for valuable consideration, by which there is an exemption from taxation, and this marks the line of discrimination between all the cases cited by the counsel for the defendant, and the authorities in support of the proposition of the plaintiff here.

The case of the Railroad Company v. Miller, 114 U. S. 176, was a case where the original charter of the C. & O. R. R. Co., without any consideration passed to the State of Virginia or West Virginia, exempted in a certain limited way taxation of that railroad company. It was properly held in that case that the purchaser under the foreclosure proceedings did not acquire any right to the exemption, because it was the privilege or favor given personally to the individual corporation. When this question is pursued further on the line of a contract, counsel will find a different line of decisions.

[fol. 176] In the case of Wilmington Railroad Company v. Allbrook, 146 U. S. 279, cited by counsel for defendant, this distinction

is plainly made between the case of contract and of mere legislative immunity. See also, 2 Morawetz on Private Corporations, section 1053-1055.

The difference between the cases cited and relied upon by the demurrant and the case at bar consists in this: That in these cases there was simply a legislative exemption without consideration. Here is a contract, in which there was a grant of exemption upon valuable consideration, in property and by the payment of money. This seems to be the line of discrimination existing in all the cases. The case of *Humphrey v. Pegues*, 16 Wall. 244, has never been overruled by the Supreme Court of the United States. It has been distinguished from other subsequent cases, but it stands as the law today, where there was a contract or a grant upon sufficient consideration. In that case the grant to the company was of all the powers, rights, &c., and was held that its grant carried with it an exemption from taxation. In the case of *Memphis v. Gaines*, 97 U. S., the grant was not of all the right and privileges, but of certain limited ones. So, in the case of *Morgan v. Louisiana*, 93 U. S. 217, there was not a grant of all the rights and privileges under the sale, but of certain special and defined rights. And the same may be said of the other cases cited by counsel for defendant on this point.

Taking the deed of June 8, 1855, and the resolutions passed by the council at the same time, it is clearly shown that the grant of the exemption was upon express consideration to the Northwestern Virginia R. R. Co., and to its assigns or successors. This was plainly the intention of the deed and contract made at that time. See the resolution passed June 8, 1855.

If this was the intention of the parties, and it was certainly fully understood by the town authorities, by the third section of the ordinance passed May 30, 1865, incorporated in the printed volume of town ordinances, and a copy filed with the papers of this case, and which is relied on, the City of Parkersburg contracted with the Parkersburg Branch R. R. Co., as the successor of the N. W. Va. R. R. Co., and it is entitled to the rights and privileges theretofore granted to the latter company. Referring to the ordinance passed [fol. 177] previous to 1865, it is especially and distinctly declared in that ordinance, that the deed of conveyance and agreement, bearing date the 8th day of June, 1855, and all other ordinances and parts of ordinances theretofore passed and not repealed, were to be in full force and binding on the City of Parkersburg and the Parkersburg Branch R. R. Co., as the successors, respectively, of the former parties thereto.

So likewise, by the ordinance passed May 10, 1867, section three, the same declaration is made and the same binding effect is given to the deed and contract and the ordinances previously passed, with relation to the Northwestern Va. R. R. Co., as being in full force and binding on the City of Parkersburg and the Parkersburg Branch R. R. Co., as the successors, respectively, of the parties thereto.

After this deed and contract were made, and after the passage of this ordinance, the corporation of Parkersburg acted in conformity therewith, collected no taxes upon the property, and -ever

sought to enforce the collection of taxes until after the year 1893.

The third, fourth and fifth propositions stated in the brief of counsel for defendant may be discussed in a few words. The mortgages under which the sale was made and the deed executed by the mayor and council of Baltimore to the Baltimore & Ohio Railroad Company, as purchaser in 1865, of the property of the Northwestern Va. R. R. Co., carried with them all the property, works, rights and franchises under the Code of Virginia, chap. 61, and entitled the purchaser to all the rights, privileges and franchises that had existed in and belonging to the Northwestern Va. R. R. Co. There is no question about this. It must not be forgotten that this suit is one in which no claim is made by the State of West Virginia for taxes, but it is a controversy between contracting parties, able to contract, in which not only a contract was made for valuable consideration, of which the city of Parkersburg has had the benefit and still is reaping the benefit and the successors of the Northwestern Va. R. R. Co., the purchaser of its property, franchises and privileges, together with the positive and explicit ratification by the city that the said contract and deed of June 8, 1855, and all the ordinances respecting the Northwestern Va. R. R. Co., and the rights and [fol. 178] privileges under the same have passed and belong to its successor, the owner of it under the purchase made in 1865.

The general proposition discussed in the cases in the Supreme Court in regard to the personal character of the exemption from taxation, that it is a privilege which does not pass without clear, express intention of the law, may well be granted. But there is an express legislative grant so far as the town or city of Parkersburg was enabled to contract and to grant. So, it is reasoning in a circle to traverse the same ground which has been so often stated in this brief, and is repeated constantly in the brief of counsel for defendant, that this case stands upon an entirely different state of facts and circumstances from any case reported or which has been adjudged in any court of the United States.

The sixth proposition in the brief of defendant's counsel is that the ordinances passed after the sale of the Northwestern Va. R. R. Co., and the reorganization of the Parkersburg Branch R. R. Co., were void for want of authority, the only consideration being the payment of \$7,500.00 and the city had no power and was forbidden to commute taxes.

In support of this proposition, counsel reiterate the same authorities in substance heretofore discussed, but without establishing their proposition. They do not give the purport and effect of the ordinances referred to; that is to say, the ordinances of 1865-67 and 70. An inspection of these ordinances shows that there was no new contract made between the city and the Parkersburg Branch R. R. Co., as to the matter in question. It was merely a declaration on the part of the town that it was the intention and purpose of the ordinance and contract of 1855, to bind the successors of both the town and the Northwestern Va. R. R. Co. The grants of the rights of way and all other privileges and franchises mentioned in the other sections of the ordinance referred to, are to be read in

connection with the provision of the third section which affirms and ratifies the contract of 1855.

That the city had the power to confirm the effect of this contract, which had been made for valuable consideration, and which, neither the State legislature nor the city council, nor any other power could violate with impunity, a contract whose obligation could not be im-[fol. 179] paired, is undeniable. The same authority existed in the town and city in 1865, 1867 and 1870, as it did in 1820, and the court must presume that the action of the city authorities was honestly intended for the benefit of the town and its inhabitants.

It will not do for the city upon a demurrer to the bill, admitting the facts, to argue that it acted in bad faith and without authority, and took the \$7,500.00 paid by the plaintiff into its treasury under commutation of taxes. There was no time, after the making of the deed of 1855, when the legislature of the State by amendment of the charter or by general law or otherwise, without the consent of the railroad company, could impair its obligation. Having the power to make the contract in 1855, there is no time in the future when the contract can be impaired by either party without the consent of the other or by any legislative power existing in the State; so that the question reverts back to the primal authority existing in the town at the time of the execution of the contract and deed.

As we have shown, the argument based on the claim that the town was required to levy taxes on all real estate and personal property within its jurisdiction, is limited by the discretion of the town in the words, "as they may deem necessary;" that is as the trustees of the town may deem necessary. Charter of 1826, section 3. At that time, in Virginia there was neither constitution nor statute that prohibited exemptions as we have shown, and the rule of equality and uniformity did not apply, as the courts of Virginia have constantly held, to municipalities.

The seventh proposition of the defendant's counsel is, that the ordinances of 1865, 1867 and 1879 granted no exemption to the Parkersburg Branch Railroad Company. The question in that brief, pages 27 and 28 from the ordinance, fully refutes this proposition. See

Humphrey v. Pegues, 16 Wall. 244;
Mobile R. R. Co. v. Tennessee, 153 U. S.

If language can be framed that would be more comprehensive in every respect than the language used in this section 3, quoted in counsel's brief, it would be difficult to do it. Everything of what-[fol. 180] ever nature or description, comprised in the deed of 8th of June, 1855, and contained in the former ordinances and part of ordinances, was continued in full force and binding on the parties "as the successors of the former parties." It does not require citation of authorities further to show the force and effect of languages like this.

The eighth proposition of counsel for defendant is, that this exemption was strictly limited to the property of the Northwestern Va. R. R. Co., owned in 1855, or that it might thereafter acquire &c.

This question does not arise upon the demurrer to the bill, and is not necessary here to be treated. If in any particular the tax complained of is levied upon any of the property, whether that which the Northwestern Va. R. R. Co., owned in 1855, or which it after acquired, then the relief claimed by the plaintiff should be granted. The argument in support of this proposition is not necessary to be considered at this time, as it relates to what may arise upon the issue on the answer to the bill.

The principle involved in this proposition has been discussed already under a former head, to-wit: as to the effect of the ordinances passed in 1865, 1867 and 1870.

The ninth proposition in the brief referred to relates to the locality of the property as defined by the limits of the town in 1855. It does not appear from anything in the bill, nor so far as the record discloses, from anything that could be resorted to in aid of the demurrer, that this question fairly rises. Where these original limits were, and where they have been extended by subsequent legislation, is not shown in the record, and if it were shown that any part of the property, subsequently acquired by the Northwestern Virginia Railroad Company, is embraced in the enlarged territory, still it would be exempt. The contract was not with the town as it was in its infancy; but with the town in its growth, the town in its development; not the town in its swaddling clothes, but the town in its swallow tail coat. A man is no less a man because he was once a boy, and it is the same John Jones, whether he is a foot high or ten feet.

The tenth proposition is, that the bill does not show that the property which is sought to be exempt is the property that was owned by the Northwestern Virginia R. R. Co., at the time of the [fol. 181] sale. But the defendant denies that part of the property in the bill set up is exempt, and admits that some of the property, in the bill referred to, was the property that was embraced in the original contract of June, 1855; hence this admission is sufficient for the purpose of giving the court jurisdiction upon the bill. There is no denial, but, on the contrary, an admission on this demurrer, that the real estate mentioned in the bill is the real estate acquired by the contract of June 8, 1855. The quotation from Desty 135, applies to an entirely different case.

The bill does show what property is exempt, that is, all the property mentioned in the bill, and also sets up the grounds upon which the exemption is claimed.

Counsel are confused in their ideas upon this proposition, because of certain cases where courts of equity have been called upon to enjoin the collection of taxes, where part of the property was subject to taxation and part not. The Court can readily see that this has no application to the case in hand, for here, the whole property in the bill mentioned is exempt as claimed by the plaintiff, and therefore, there is no part of that is not exempt, upon the face of the bill.

The eleventh proposition asserts that the plaintiff is a distinct corporation from the Parkersburg Branch Railroad Company, and as such, has no right to maintain the suit. However, much we may

differ with the counsel for the defendants on this proposition, it is unnecessary to discuss it. If they had asserted their right to collect the taxes from the property of the so-called Parkersburg Branch R. R. Co., alone, this bill might not have been filed, but as the bill shows, the city has caused a levy to be made upon the property of the plaintiff, its own individual property—property which does not belong to the Parkersburg Branch Railroad Company, and it has a right to maintain this suit. So, the authorities cited by counsel in support of the eleventh proposition have no application to the case before the Court.

The twelfth proposition contended for is, that the contract for exemption, made in 1865 and 1867, is not legal by reason of the Code of 1868. This is not logical. If we have discussed anything, it is this question, and yet it is made the basis of subsequent propositions, which are wholly untenable.

The argument is, that if the city had the right to exempt the [fol. 182] property by the ordinances of 1865 and 1867, yet this contract was rendered void by the general provisions of sections 30-31 of chapter 47, Code of 1868, and the payment of \$7,500.00 made in 1870 was therefore nugatory. This question raised by the 13th proposition, is easily disposed of. They involve the question whether, if the contract was not authorized or was void, as being beyond the powers of the town, the railroad company could require the town to refund the money and made a transfer of the property conveyed to it by the deed.

It is seriously argued by defendant's counsel, that if the contract was void, the town cannot be compelled to refund the money or reconvey the property; and in support of this contention certain cases are cited from the Supreme Court, but, on examination, these cases are not like the case at bar. Take for instance, the case of *Thomas v. City of Richmond*, 12 Wall. 849, where, according to the law of Virginia at that time, no city or town could issue notes and put them in circulation as currency, and against doing such an act, there was a penalty. Justice Brewer, who delivers the opinion, draws this distinction. He says these bills were issued not only contrary to positive law, but contrary to public policy, and that it was a criminal offense according to public policy, and that it was a criminal offense according to the Code of Virginia at the time these bills were issued. Now, the Supreme Court of the United States has not said one thing at one time and another at another on the same proposition, during the same decade, at least. In the case of *Salt Lake City v. Hollister*, 118 U. S. 256, Justice Miller delivered the opinion of the Court; in the third syllabus of that case, it is said, in cases where corporation- have been sued on contracts, the enforcement of which they have resisted because they were ultra vires, the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use. This was an action at law and he says this rule applies in a class of cases where the contract was made by

parties dealing with the corporation with knowledge of the powers of the corporation. See close of opinion (L. R. A., edition). See also

- [fol. 183] Marsh v. Fulton County, 10 Wall. 676-684;
 Louisiana v. Wood, 102 U. S. 294;
 Hiltenger v. Cook, 18 Wall. 421;
 Marville v. Am. Tract Society, 123 Mass. 137;
 Parkersburg v. Brown, 106 U. S. 487;
 Hitchcock v. Galveston, 96 U. S. 341, 350;
 Pimental v. San Francisco, 21 Cal. 362.

The case of Litchfield v. Ballou, 114 U. S. 190, is similar to the case of Thomas v. Richmond, and the like may be said of the other cases cited by the counsel for defendant.

The principle is well settled then by the Supreme Court of the United States, irrespective of the opinions of the State Courts.

If the contract was beyond the legitimate powers of the city or town, it must notwithstanding, refund the money, and reconvey the property which *were* the consideration of the contract. Chapman v. Douglas County, 107 U. S. 348. So, that on this proposition the plaintiff is well fortified in its contention that if the court should be of opinion, that the contract was void on any ground, but certainly not on any grounds alleged by the defendant's counsel, as we have shown, still the city must refund the money paid and reconvey the property.

The contention under proposition fourteen of defendant's brief, that the plaintiff is endeavoring to sue under cover to avoid payment of taxes, is absurd to say the least, and to suggest that the plaintiff is endeavoring to defraud the city out of its taxes is ridiculous.

The proposition number fifteen in the brief, in substance contends that the charter of the Northwestern Va. R. R. Co., and the Parkersburg Branch R. R. Co., are subject to alteration and amendment at the pleasure of the legislature, and that the exemption granted by the contract of 1855 and the ordinance of 1865-67-70 could be withdrawn without impairing the obligation of the contract, is not tenable.

We have sufficiently discussed the construction and effect of this contract, and nothing more need be said on that subject at this time. If the contract was void in its inception, as contended, I do not see the propriety of discussing the question as to the power of the legislature to avoid it by amending the charter, if it ever did amend [fol. 184] the charter, which is not shown. The contract and deed of 1855, if valid and made under the authority of law at the time they were entered into, could not be impaired by any subsequent change of the law or constitution.

The cases cited by counsel for defendant, among which is the case of Williams v. New Jersey, 130 U. S. are unlike the case at bar, as we have distinguished them.

The last proposition of defendants' counsel is, there is no estoppel upon the State to assess and collect taxes. It is not contended that the State may not collect taxes, but the tax in question is not a

State tax. It is a tax assessed and claimed for the benefit of the City. The State has received its taxes from the plaintiff. The State is making no claim for taxes. The railroad company has always paid its taxes to the State and to the County. It is argued that the city is not bound by any statute of limitation. If that question arises here, it is not true that the city is not so bound, because, by the Code of West Virginia, ever since the Code of 1868, the city as well as the State, is bound and concluded by the statute of limitations. Section 20 of chapter 35 of the Code, says that the statute of limitations, unless otherwise expressly provided, shall apply to the State, and this is stated as the law in West Virginia, in the case of *Wheeling v. Campbell*, 12 West Va. 360, applied to a municipal corporation, wherein it is held that the City of Wheeling is bound and concluded by the statute of limitations and laches.

It is unnecessary to review any other authorities cited by counsel for defendants in their printed brief.

The brief counsel for defendants, evidently, was prepared with a view of discussing questions that may arise upon an issue raised upon their answer.

It is respectfully insisted that the demurrer is not well taken.

It will be observed that the bill alleges that in the attempt to collect these taxes, the city has caused the sheriff to levy upon the property of the plaintiff, not for the taxes of the plaintiff, but for taxes against the Parkersburg Branch R. R. Co., or Parkersburg Branch as the certificate sent down to the sheriff indicates.

If nothing else would justify the interposition of the court by in-[fol. 185] junction in this case, it would be the fact that here is an attempt to levy and collect taxes by distraining property worth twenty times as much as the amount of taxes and the property threatened to be sold or injured by the levy is the measure of the jurisdictional amount.

- 43 Federal Reporter 609;
- 38 Federal Reporter, 834;
- 43 Federal Reporter 545;
- 41 Federal Reporter 610;
- 2 Black's Reports 485.

It is respectfully urged that the demurrer should be overruled and the defendant required to answer.

Jno. A. Hutchinson, of Counsel for Plaintiff.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF
WEST VIRGINIA, PARKERSBURG, JUNE TERM, 1894

[Title omitted]

COPY OF BRIEF FILED BY LAIRD & TURNER, ORIGINAL COUNSEL FOR
CITY OF PARKERSBURG—Filed February 7, 1923

I. Parkersburg has never had authority to commute taxes or to bargain her power of taxation.

Probasco v. Moundsville, 11 W. Va. 501;

Charleston v. Reed, 27 W. Va. 681;

Point Pleasant v. Town, 32 W. Va. 328.

II. In the absence of such power, the attempt is void.

[fol. 186] Sioux City R. R. Co. v. Sioux City, 138 U. S.;

State v. Hannibal, 75 Mo. 208.

III. Where an exemption is validly granted under W. Va. laws to a railroad company, that exemption is personal and does not pass by sale under mortgage.

C. & O. R. R. Co. v. Miller, 114 U. S. 176.

IV. A corporation organized as purchaser of property under W. Va. statute since 1863, can not take or retain a tax exemption.

C. & O. R. R. Co. v. Miller, 114 U. S. 176.

V. Where an exemption is valid, it covers only the property, area and thing specified; and can not be stretched to cover persons or property not designated.

Pickard v. R. R. Co., 130 U. S. 672;

Wilmington v. Alsbrook, 146 U. S. 270.

VI. A stockholder can not file bill in equity in violation of Equity Rule No. 94.

VII. No laches can bar the continuing duty to tax.

U. S. v. Beebe, 127 U. S. 338;

12 Am. & Eng. Ency. Law, p. 565.

VIII. Where right is reserved to amend a law granting exemption such exemption may be arbitrarily repealed at any time.

New Orleans Water Works v. New Orleans, 142 U. S. 79.

Water Co. v. Clark, 143 U. S. 1.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT
OF WEST VIRGINIA

In Equity

BALTIMORE & OHIO RAILROAD COMPANY

v.

CITY OF PARKERSBURG and J. W. DUDLEY, Sheriff

[fol. 187]

Brief of Laird & Turner

Statement

The Baltimore & Ohio Railroad Company files a bill to enjoin the City of Parkersburg and J. W. Dudley, sheriff, from collecting taxes for the year 1893, assessed for city purposes by State Auditor, on certain Railroad property in Parkersburg.

The Ground of that injunction is, that the Baltimore & Ohio Railroad Company, in February, 1865, purchased the property of the Northwestern Virginia Railroad Company, under a sale had by virtue of mortgages that had been executed by the Northwestern Virginia Railroad Company, upon its property; the Baltimore & Ohio Railroad Company claiming that by reason of that purchase, and by reason of contracts, made after that purchase, the railroad property can not be assessed, as complained, with taxes for the use of the City of Parkersburg.

Taking these matters in the order set out, it is alleged:

First. The N. W. Va. R. R. Co. was incorporated under a charter of Virginia in 1850. (Acts of 1850-51, pages 69-70.)

It was subject to an Act passed March 11, 1837 (Acts of 1836-37, page 112), which reserved the right to alter, amend or repeal the charter of railroad companies. In March, 1853, the company executed two mortgages, one to the city of Baltimore, and one to the Baltimore & Ohio Railroad Company, covering all the property of the N. W. Va. R. R. Co., including that subsequently acquired. (The bill is in error as to subsequently acquired property; that feature applying only to the property that should be accumulated.)

In 1854, John J. Jackson and others, conveyed to the N. W. Va. R. R. Co. certain lands fronting on the rivers at Parkersburg. On June 8th, 1855, an ordinance was passed and a contract was made between the town and the N. W. Va. R. R. Co., under which the railroad granted to the town of the property that had been acquired [fol. 188] quired from Jackson and others, all the banks and shores in front of the town, to be used for wharves and landing, and to be improved and kept in repair by the town; and the railroad company was required to construct wharves at the point and at the foot of Court street.

On the other hand, besides certain reservations as to banks and

shores, the company was given rights of way through streets of the town, and "all property of the company within the town, while the same continues to be used by them for, or as appropriated to the business of their road, shall be free from all town taxes and assessments; and all privileges hereby granted or secured to the company, shall apply as well to property and rights hereafter acquired by them, as to those they now acquire or possess."

On the 15th day of February, 1865, a sale was made of the property of the N. W. Va. R. R. Co., under the mortgages. The property was bought in by the Baltimore & Ohio R. R. Co., and by virtue of a statute of Virginia (secs. 28 and 29 of Chap. 61 of the Code of '60), the B. & O. R. R. Co., as purchaser, declared that the property should become a corporation by the name of the "Parkersburg Branch Railroad Company."

It is claimed by the bill, that the exemption created by the deed and ordinance of June 8, 1855, passed by virtue of the sale under that mortgage, to the Parkersburg Branch Railroad Company.

This is the first main issue in the case.

Second. After the P. B. R. R. Co. received its deed, an ordinance "authorizing the extension of the Parkersburg Branch R. R. Co., through the city to the Ohio River," was passed on May 30, 1865, by the 3rd section of which the alleged deed and contract of June, 1855, is reaffirmed. (City Laws 262.)

Afterwards, on May 10, 1867, another ordinance was passed reaffirming, in section 3, the contract and ordinance of June, 1855, and each of these ordinances of 1865 and 1867, refers to the P. B. R. R. Co., as being "late the N. W. Va. R. R. Co."; and, finally, on the 15th day of March, 1870, an ordinance was passed, releasing the P. B. R. R. Co., from the building of the wharf at the foot of Court street, on paying \$7,500.00 to the city. That sum was paid [fol. 189] to the City of Parkersburg by the B. & O. R. R. Co., for the P. B. R. R. Co.

Third. The claim of the bill is, that under all of these acts, contracts and ordinances, the N. W. Va. R. R. Co., was exempt from taxation; that the property of that company, when it passed into the hands of P. B. R. R. Co. was exempt by reason of the contracts theretofore made, and that the ordinances and contracts made between the City of Parkersburg and the P. B. R. R. Co., subsequent to the purchase, gave immunity and exemption from taxes directly to the P. B. R. R. Co., and that all of these transfers of property and payments of money were a commutation and a payment and a satisfaction to the City of Parkersburg throughout eternity; and estopped and prevented the city, not only from claiming any taxes as to property that came from the N. W. Va. R. R. Co., but as to any property that the P. B. R. R. Co. might acquire.

Fourth. Then the charge is made, that under some undisclosed arrangement the B. & O. R. R. Co., is operating the P. B. R. R. Co., and is required to pay its taxes; and that the Auditor of West Virginia has certified down to the sheriff of Wood County, for collection,

the sum of \$1,042.73, due to the City of Parkersburg for taxes on account of the railroad property operated by the B. & O. R. R. Co., within the City of Parkersburg, and that Dudley has levied on two engines of the B. & O. R. R. Co., which are worth \$20,000.00.

Upon this bill an injunction was granted, without notice, and June 15, has been set for the hearing.

Thereupon, the defendants demur to the bill, and without waiving their demurrer, the City of Parkersburg answers.

And from its answer it appears:

First. It admits the incorporation of the Northwestern Virginia Railroad Company; the execution of the mortgages of 1853; the adoption of the town ordinance and execution of the deed of June 8, 1855; the attempt to exempt the then present and afterwards [fol. 190] accumulated property of said road within the then existing town limits from town taxes; the foreclosure of the mortgages in 1865; the purchase by the B. & O. R. R. Co.; the creation of the P. B. R. R. Co., and the conveyance thereto of the property of the N. W. Va. R. R. Co. And refers to the several papers for their contents and construction.

The mortgage of 1853 did not cover subsequently acquired property, the language of the deed being:

"All property of the North Western Virginia Railroad Company of every kind, nature and description, the same may be as well that which they may at the time actually hold, as that which in the prosecution, stocking, completion and working of said railroad shall be accumulated thereon."

That the exemption attempted to be created by the deed and ordinance, did not extend to property not in the then limits of the town, and did not extend to the successors or assigns of the grantee—the language of the deed being:

"All the property owned, used or occupied by the parties of the second part within the jurisdiction of the parties of the first part, so long as the same is used or appropriated by them to the purpose connected with the business of the railroad company, shall be free from all town taxes, assessments and charges and that all the privileges hereby granted and assured by the parties of the first part to the parties of the second part, shall apply as fully to property and rights hereafter acquired, used or occupied by them within the said town and jurisdiction, as to those they now own, use or occupy or may hereafter use and occupy and subject to a like condition and limitation."

That the exemption did not pass to the B. & O. R. R. Co., or the P. B. R. R. Co., by deed of April 3, 1865, the language of the deed being:

"All the property of the Northwestern Virginia Railroad Company of every kind and description, as well as that held by the said [fol. 191] company at the date of the deed of trust aforesaid, as that

which in the prosecution, completion, stocking and working of the said railroad has been accumulated thereon."

That the exemption was void for want of power, and was forbidden by the existing laws and public policy; that it was a personal privilege which could not be transferred or assigned, and expired with the N. W. Va. R. R. Co.; that the complainant destroyed the city as the terminal point for the road by extending it; and that the town had subscribed fifty thousand dollars of the capital stock of the road, which was wholly lost.

That the property of the N. W. Va. R. R. Co., became the property of the P. B. R. R. Co.; that the B. & O. R. R. Co., became a stockholder therein, and had no interest in its property except as stockholder, and was a separate corporation.

Second. It admits the ordinance of 1865.

From section 1 of this ordinance it appears that the Parkersburg Branch Railroad Company was empowered to extend their railroad, with the siding, embankment, piers &c., from their property on Green street, along and above Washington street to the Ohio river, at the foot of Washington street.

Section 2. The Parkersburg Branch Railroad Company was authorized to close and appropriate to their exclusive use, St. Cloud Court Alley, between Green and Avery Streets, and to lay as many tracks across Green and Washington, at the intersection of said streets, as they chose.

Section 3. "It was granted to said company to use steam or other power to propelling their cars over their tracks, subject to the ordinance of October 25, 1852," and then declares with said ordinance, "That the deed of conveyance and agreement between the said President, Recorder and Trustees, and the said Northwestern Virginia Railroad Company, bearing date on the 8th day of June, in the year one thousand, eight hundred and fifty-five, and of record in the county of Wood, and State of West Virginia, and all other ordinances [fol. 192] and parts of ordinances heretofore passed by the said town, and accepted by the Northwestern Virginia Railroad Company, and not repealed, are hereby declared to be in full force and binding on the City of Parkersburg and the Parkersburg Branch Railroad Company, as the successors, respectively, of the former parties thereto."

(Not a single word is said about the exemption.)

Section 4. "The permission and privileges granted by this ordinance are granted upon these conditions, and not otherwise, namely: that if the Mayor and City Council of the City of Parkersburg shall at any time hereafter ordain and direct the widening of Washington street aforesaid, from Green street to the Ohio River, to the width of not more than 80 feet from side to side, including the sidewalks, the said Parkersburg Branch Railroad Company shall reimburse and pay to the said city whenever legally demanded, all damages and

costs, which have been paid by or awarded against the said city, according to law, for injury to adjoining property, occasioned by said widening for the intended purposes, and for the price of land taken for such widening and the improvements thereon; and further, that the said Northwestern Virginia Railroad Company, will, without unnecessary delay, proceed to the construction of the wharf at the foot of Court street in said city, as provided in the deed, conveyance and agreement hereinbefore referred to, and complete the same at their cost and charge within two years from the first of March, 1865," &c., &c. Said wharf, when completed to be the property of the city.

That the ordinance of May 10, 1867, was passed.

By this ordinance, the ordinance of May 30, 1865, was reaffirmed.

That the ordinance of March 15, 1870, was passed and that by the terms thereof, the P. B. R. R. Co., was relieved from the construction of the said wharf, upon the payment of \$7,500.00 and said ordinance of May 10, 1867, was re-enacted and declared in full force.

That the \$7,500.00 was paid by the Parkersburg Branch Railroad Company.

That the city received no other sum under this ordinance; that there was no contract between the city and the B. & O. R. R. Co. for [fol. 193] an exemption from taxation; that no money was ever paid by the B. & O. R. R. Co., in consideration of any exemption.

Third. That the property of the N. W. Va. R. R. Co. when it passed into the hands of the P. B. R. R. Co. was not exempt.

The ordinance of 1867 and 1870, gave no exemption from taxation to the P. B. R. R. Co.

That the \$7,500.00 was not a satisfaction to the city for taxes and that the acceptance of such sum does not estop or prevent the city from claiming taxes on property that came from the N. W. Va. R. R. Co. and the property that the P. B. R. R. Co. has acquired since.

That the property of the B. & O. R. R. Co. is not exempt.

That the ordinances of 1865, 1867 and 1870, so far as they attempted to provide for an exemption were illegal and void, and the city officers and the officers of the railroad company knew such to be the case.

The contract of June 8, 1855, was never ratified in any way.

The charter of the P. B. R. R. Co. was subject to the provisions of section 1 of article 8, and section 5 and 8 of article 11 of the Constitution of West Virginia of 1863, which provide:

Sec. 1, Art. 8. No property shall be exempt from taxation.

Sec. 5, Art. 11. No charter or incorporation shall be granted under general laws, unless the right be reserved to alter or amend such charter at the pleasure of the legislature.

Sec. 8, Art. 11. "The laws of the State of Virginia, as are in force within the boundaries of the State of West Virginia when this constitution goes into operation, and are not repugnant thereto, shall be and continue, the law of this State, until altered or repealed by the legislature."

[fol. 194] That by the Code of 1868, chapter 47, sections 30, 31, the city was compelled to tax all real estate and personal property within its corporate limits.

The legislature, by an Act of February 28, 1877, and Acts amendatory thereof, took away from the city the power to levy and collect taxes upon the property of railroad companies, used in connection with their business, within its jurisdiction, and vested the whole of said power in the Board of Public Works and Auditor of the State, by the statute as found in the Code of 1891, chapter 29, section 67.

That by the statute, all property of railroads not used in connection with its business should be assessed the same as other property; the town was forbidden to compromise or remit any part of taxes so assessed, or to exempt any property from taxation; that the B. & O. R. R. Co. since February 15, 1865, acquired, owns and has owned from the date of acquisition, real estate, bridge approaches and other property valued at over three hundred and seventy-five thousand dollars, and never paid to the city one cent of taxes.

The *the B. & O. R. R. Co.*, in order to evade the payment of taxes upon its property, has caused it, or a portion of it, to be returned to the Auditor of the State for taxation as the property of the P. B. R. R. Co.

That the B. & O. R. R. Co. has railroad tracks in the city upon which it pays no taxes; that of the 53,000 feet of track in the city belonging to the P. B. R. R. Co. only 20,400 are in the limits of the town of Parkersburg, as they were in 1855; that the greater part of the property of the P. B. R. R. is outside of the city limits, as they were in 1855; that the whole rolling stock used in the city is the property of the B. & O. R. R. Co.

That the greater part of the \$1,042.73 assessed as upon the property of the P. B. R. R. Co. was in point of fact assessed for taxes for the most part upon the property of the B. & O. R. R. Co.

That the sum of \$1,042.73 was legally assessed and ought to be collected; that the city has violated no agreement on its behalf; that it has had the use of no property of the plaintiff; that the B. & O. R. R. Co., has paid taxes on its bridges for about ten years and paid the taxes assessed against the P. B. R. R. Co. for the year [fol. 195] 1892 and paving and sewerage assessments against its property.

That the city is not estopped to have the taxes assessed and collected.

It further appears from the answer that the right to tax the property of the B. & O. R. R. Co., and the P. B. R. R. Co. is worth more to the city than \$20,000; that the city would be deprived of that much were the right to assess and collect taxes denied her.

I. The attempted exemption of 1855 to the Northwestern Virginia Railroad Company was void (1) for want of power; and (2) because forbidden.

II. If the attempted exemption of 1855 was valid, it was personal to the Northwestern Virginia Railroad Company and did not enter into the mortgages.

III. The exemption did not pass by the sale and conveyance of April 3, 1865, and the Baltimore and Ohio Railroad Company, as purchaser, got no exemption.

IV. The Parkersburg Branch Railroad Company, as purchaser, got no exemption by reason of the sale and purchase.

V. Upon the sale, under the mortgages, the Northwestern Virginia Railroad Company was ipso facto dissolved, and all its powers and existence ceased, and the Parkersburg Branch Railroad Company organized as a label for the property became a distinct corporation, subject to the Constitution and existing laws of the State of West Virginia, which forbade any exemption; so that, no exemption passed to, or was vested in, the Parkersburg Branch Railroad Company, for two reasons: (1) the exemption, if valid, ceased with the Northwestern Virginia Railroad Company; (2) the law forbade such exemption at the time the Parkersburg Branch Railroad Company came into being.

VI. The Ordinances passed after the organization of the Parkersburg Branch Railroad Company, (1) were void for want of authority, the only consideration therefor resting upon the payment of [fol. 196] \$7,500.00; (2) the city had no power and was forbidden thus to commute taxes.

VII. The ordinances of 1865, 1867 and 1870 did not grant any exemption to the Parkersburg Branch Railroad Company.

VIII. (1) But if so, the exemption was strictly limited to the property of the North Western Virginia Railroad Company owned in 1855, or that it might thereafter acquire:

(2) and the Parkersburg Branch Railroad Company, by the ordinances of 1865 and 1867, if valid, got only the exemption upon the property which it acquired from the Northwestern Virginia Railroad Company.

IX. The exemption granted to the Northwestern Virginia Railroad Company was limited to its property owned or afterwards acquired in the then limits of the town, and this exemption did not extend to property brought into town limits by extensions so that the exemption granted to the Parkersburg Branch Railroad Company covered no property except that which was in the town limits as they were in 1855.

X. The bill does not show that the property which is sought to be exempt, is the property that was owned by the Northwestern Virginia Railroad Company, at the time of sale.

XI. The Baltimore & Ohio Railroad Company is a distinct corporation from the Parkersburg Branch Railroad Company. It is

a stockholder in the Parkersburg Branch Railroad Company, and as such has no right to maintain a suit under an alleged arrangement with the Parkersburg Branch Railroad Company.

XII. The contract for the exemption made in 1865 and 1867, if valid, was rendered unlawful and void by the Code of 1868, secs. 30 and 31, chapter 47, before the \$7,500.00 was paid.

XIII. The City could not ratify or confirm the contract and ordinance of 1855, or the ordinance of 1865, and 1867, by the ordinance of 1870 and receipt of the \$7,500.00; nor did the same work any estoppel upon the city.

XIV. The scope of the bill and the allegations show, as the fact is, that the Baltimore & Ohio Railroad Company is suing under the cover of the alleged exemption granted the Parkersburg Branch Railroad Company, to avoid the payment of taxes on the property owned by the Baltimore & Ohio Railroad Company, which was at no time exempt for the Northwestern Virginia Railroad Company, or the Parkersburg Branch Railroad Company.

XV. (1) The charters of the Northwestern Virginia Railroad Company and that of the Parkersburg Branch Railroad Company were subject to alteration and amendment at the pleasure of the Legislature.

(2) And the exemption granted by the contract and ordinance of 1855, and the ordinance of 1865, 1867 and 1870, could be withdrawn at any time without impairing the obligation of the contract.

XVI. (1) There is no estoppel upon the State to assess and collect the taxes under sec. 67, chap. 29 of the Code; (2) nor upon the city having the benefit of them.

Now taking these propositions in order:

I. The attempted exemption of 1855 to the Northwestern Virginia Railroad Company, was void (1) for want of power; and (2) because forbidden.

1. A municipal corporation has no power to do any act, except those granted by express words in its charter, or by general statute under which it is created; and those essential to the declared purposes of the corporation, not simply convenient but indispensable.

Gas Co. v. Parkersburg, 30 W. Va. 439;

Charleston v. Reed, 27 W. Va. 681;

1 Dillon Mun. Corp., sec. 89;

[fol. 198] 1 Beach Pub. Corp., sec. 538.

Any fair and reasonable doubt concerning the existence of the power is resolved by the courts against the corporation.

Ottawa v. Cary, 108 U. S. 110, 112;

1 Beach Pub. Corp., sec. 539.

The power of taxation and that of exemption from taxation are essential elements of sovereignty, which are lodged exclusively in the Legislature of the State.

1 Desty on Taxation, 81 and 124;
Cooley on Taxation, 62 and 63;
Probasco v. Moundsville, 11 W. Va. 501;
Merriwether v. Garrett, 102 U. S. 472.

In this last case, at page 515, Justice Field says:

"The levying of taxes is not a judicial act." * * * It is the high act of sovereignty to be performed only by the Legislature." * * * In the distribution of the powers of government in this country, into three departments, the power of taxation falls to the Legislature."

West Virginia Rule

A municipal corporation has no inherent power to tax, or exempt from taxation, and such corporation can levy no tax unless the power be plainly and unmistakably conferred, and a contract to exempt without legislative authority, is void.

Probasco v. Moundsville, 11 W. Va. 501;
Dillon's Mun. Corp., sections 741 and 763;
1 Desty on Taxation, pp. 81, 253 and 456;
State v. Hannibal & St. J. R. Co., 75 Mo. 208;
Brewer Brick Co. v. Brewer, 16 Am. Rep. 395;
1 Beach Pub. Corp., sec. 1443 and note, and sec. 1445;
Whiting v. West Point, 14 S. E. R. 698.

[fol. 199] Lewis, P., in the case last cited, at page 699, says:

"nothing is said in the charter about making exemptions. Has the corporation then the power to make them? We think it clear both upon principle and authority, that it has not. A municipal corporation has no element of sovereignty. It is a mere local agent of the State, having no other powers than such as are clearly and unmistakably granted by the law making power. A doubtful corporate power, it has been said, does not exist * * * Now the power of taxation is not only an attribute of sovereignty, but it is essential to the existence of the government. * * * So, also, is the power to make exemption sovereign in its nature and likewise resides in the legislature, unless the Constitution otherwise ordains. It is therefore a legal solecism to say that the power of exemption or any other sovereign power is inherent in a municipal corporation" * * * And after citing authorities, he says: "Therefore the statutory authority must be strictly pursued, for an agency to sell does not imply an agency to buy, so neither does a delegated power to tax, imply a power to exempt."

Where the power to exempt does not exist, neither does the power to commute.

1 Desty on Taxation, 145, 146;
State v. Hannibal & St. J. R. Co., 75 Mo. 209;
Austin v. Coal Co., 7 S. W. Rep. 200.

In the case of *Austin v. Coal Co.*, supra, it is said:

"It is urged that the contract in question did not give an exemption from taxation, but, by way of commutation, the gas company paid and agreed to pay to the city through the deductions to be made in favor of the city from the prices paid by other customers for gas, a sum equal to or greater each year than would be the taxes on the company's property, and that therefore, the contract was not invalid. This proposition, we think unsound. The power to commute taxes, as said by the Supreme Court of Louisiana, is but an incident of the power to exempt, and when the latter does not exist, the incidental power must be denied. * * * The thing given or paid in commutation is but the price paid for exemption from liability to do some act, or to pay some other sum."

[fol. 200] In the Charter of 1820, no provision was made for the assessment of taxes, and the same was governed by the general law.

In the Charter of 1826, sec. 3, it was provided:—"For the better enabling the Trustees to improve the streets and alleys, and to remove such nuisances, as affect the health of the inhabitants of the said town they shall have power to levy such reasonable taxes on all tithables, and on all real and personal property within the said town as they may deem necessary; Provided, that they shall not in any one year levy more than one dollar on each tithable, or more than fifty cents on every hundred dollars worth of property in said town."

In the Charters of 1842 and 1851 no provision was made for the assessment of taxes.

The general law in force, Code of Virginia, chapter 54, section 19, made no provision for exemption from or commutation of taxes.

No presumption can be indulged in favor of an exemption; every reasonable doubt is to be resolved against it; and where it exists, it is to be rigidly scrutinized and never to be permitted to extend in scope or duration beyond what the terms of the concession require.

W. & M. Railroad v. Alsbrook, 146 U. S. 279, 295;

Hoge v. R. R., 99 U. S. 355;

Bank v. Tennessee, 94 U. S. 493;

1 *Desty on Taxation*, 130 and 134.

Therefore, as the power did not exist to make the contract for the exemption, it was void.

State v. Hannibal & St. J. R., 75 Mo. 209;

Austin v. Coal Co., 7 S. W. Rep. 200 and authorities, supra.

2. The contract was void because forbidden by public policy and existing statutes.

Such contract is in derogation of common right; contrary to the principles of civil liberty and natural justice, and against public policy.

1 *Desty on Taxation*, 122, 123 and 133;

Memphis v. Berry, 112 U. S. 609;

C. & O. R. R. v. Miller, 114 U. S. 176.

[fol. 201] The words as used in section 3 of charter of 1826, above quoted; "and on all real and personal property within the said town," are the same used in the Code of West Virginia, 1868, chapter 47, section 31, and have been construed to prohibit the granting of any exemption from taxation by municipal corporation.

Probasco v. Moundsville, 11 W. Va. 509;

Powell v. Parkersburg, 28 W. Va. 699.

Pt. Pleasant Bridge Co. v. Town, 32 W. Va.

In this last case, the Court at page —, says:

"Property subject to State taxation being thus made expressly subject to town taxation, it follows that this bridge is not only liable to taxation for town purposes, but that it must be taxes, the council having no discretion to exempt it," &c., &c.

II. If the attempted exemptions of 1855 *was* valid, it was personal to the Northwestern Virginia Railroad Company and did not enter into the mortgages.

All that was conveyed to the mortgages by the mortgages of 1853, was:

"All the property of the Northwestern Virginia Railroad Company of every kind, nature and description, the same may be as well as that which they may at the time actually hold, as that which in the prosecution, stocking, completion and working of said railroad company shall be accumulated thereon."

No express or other reference is made or could have been made in 1853 to a thing then not in contemplation, or which did not come into being until 1855, and in the construction of the deed of 1855, it is a pregnant fact that all the privileges granted to the Northwestern Virginia Railroad Company were in express terms granted to its successors except that the exemption is granted to said corporation alone.

No franchise of the company, even, is expressly conveyed.

An exemption from taxation is a privilege personal to the very corporation or other person to whom it is granted; it is not transferable or assignable; it is not a franchise; it does not run with the property after it passes from the owner to whom it was granted.

1 Desty on Taxation 168.

Morgan v. Louisiana, 93 U. S. 217.

Wilson v. Gaines, 103 U. S. 417.

L. & N. R. Co. v. Palmer, 109 U. S. 244.

Memphis v. Berry, 112 U. S. 609.

C. & O. R. R. Co. v. Miller, 114 U. S. 176.

In Morgan v. Louisiana, *supra*, the Court says:

"The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without

which its road and works would be of little value; such as the franchise to run cars * * * They are positive rights or privileges without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, incapable of transfer, without express statutory direction." Page 223.

In *Wilson v. Gaines*, *supra*, the Court says:

"In *Morgan v. Louisiana* (93 U. S. 217), we distinctly held that immunity from taxation was a personal privilege and not transferable, except with the consent or under the authority of the legislature which granted the exemption, or some succeeding legislature and that such exemption does not necessarily attach to or run with the property after it passes from the owner in whose favor the exemption was granted."

In *Memphis v. Berry*, *supra*, the Court says:

"The exemption from taxation must be construed to have been the personal privilege of the very corporation specially referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor. This statutory rule of interpretation is founded upon an obvious public policy, which regards such exemption as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the grant construed strictissimi juris."

III. The exemption did not pass by the sale and conveyance of April 3, 1865, and the Baltimore & Ohio Railroad Company, as purchaser, got no exemption.

The deed made by the Mayor and City Council of Baltimore, April 3, 1865, conveyed:

"All the property of the Northwestern Virginia Railroad Company of every kind and description, as well that held by the said company at the date of the deed of trust, aforesaid, as that which in the prosecution, completion, stocking and working of said railroad has been accumulated thereon."

It necessarily follows from the fact that the exemption was not conveyed by the mortgages to the mortgagees, that it could not be conveyed to the purchaser at the foreclosure sale. The purchaser could not receive more than was mortgaged. And especially would this be true when the conveyance to the purchaser makes no pretense of transferring the exemption.

Railroad Co. v. Hamblen, 102 U. S. 276-7.

Pickard v. R. R. Co., 130 U. S. 637.

IV. The Parkersburg Branch Railroad Company, as purchaser, got no exemption by reason of the sale and purchase.

The sale under these mortgages took place under the provisions of the Code of Virginia of 1860, chapter 61, section- 28 and 29, and the Parkersburg Branch Railroad Company came into being by virtue thereof, as is clearly shown by the terms of the deed of April 3, 1865.

By these sections it is provided:

"In a sale made under a deed of trust or mortgage, executed by a company on all its works and property, and there be a conveyance pursuance thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company, [fol. 204] as they were at the time of making the deed of trust, or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts, due to it. Upon such conveyance to the purchaser, the said company shall ipso facto be dissolved. And the said purchaser shall forthwith be a corporation by any name which may be set forth in the said conveyance or in any writing signed by him and recorded in the court in which the conveyance shall be recorded."

"The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges and perform all such duties as would have been had or should have been performed, by the first company but for such sale and conveyance; save only that the corporation so created shall not be entitled to the debts due to the first company, and shall not be liable for any debts of or claims against the said first company, which may not be expressly assumed in the contract of purchase, and that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein as he or they may think proper, not exceeding together the amount of stock in the first company at the time of the sale, and assign the same in a book to be kept for that purpose."

It is not necessary to argue the question whether an exemption granted to the debtor company, whose property has been sold under these sections, passes by virtue thereof to the new corporation created thereby, for the Supreme Court of the United States has, in the case of the C. & O. R. R. Co. v. Miller, 114 U. S. 176, construed these very identical sections and declared that by them an exemption from taxation did not pass. See pp. 181-2-3:

V. Upon the sale, under the mortgages, the Northwestern Virginia Railroad Company was ipso facto dissolved, and all its powers and existence ceased, and the Parkersburg Branch Railroad Company organized as a label for the property became a distinct corporation, subject to the Constitution and existing laws of the State of West Virginia, which forbade any exemption; so that, no exemption passed to, or was vested in, the Parkersburg Branch Railroad Company, for two reasons: (1) The exemption, if valid, ceased

with the Northwestern Virginia Railroad Company; (2) the laws forbade such exemption at the time the Parkersburg Branch Railroad Company came into being.

That the Northwestern Virginia Railroad Company was dissolved and its power and existence ceased, the section 28, above quoted, conclusively proves and were anything necessary further to be added, there might be quoted Mr. Justice Field's words in construing this section, in *C. & O. R. R. Co. v. Miller*, 114 U. S. 187-8:

"It can (the new corporation), in no sense, be regarded as the identical corporate body, of which it became the successor, merely discharged by a process of insolvency from further liability for past debts, * * * The language of the statute expressly contradicts this assumption. The old corporation is in terms dissolved. The purchasers are as explicitly declared to become a corporation and its corporate powers are conferred by reference to those which had belonged to their predecessors."

The Parkersburg Branch Railroad Company was a new corporation, "the old corporation had passed out of existence and the new corporation came into existence under a fresh grant. Not only its being, but its powers, its franchises, and immunities, are grants of the legislature which gave it its existence."

Railroad Co. v. Georgia, 98 U. S. 364.

"When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were granted to it, in all respects, in the view of the law as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation."

[fol. 206] *Shields v. Ohio*, 95 U. S. 323-324.

1. From these cases it will be seen that the rights, privileges and immunities of the Northwestern Virginia Railroad Company expired with it, even though valid in their inception.

2. The Parkersburg Branch Railroad Company came into existence and all grants of corporate powers, rights, privileges, franchises and immunities are taken, subject to existing laws.

C. & O. R. R. v. Miller, 114 U. S. 176.

By the Constitution of West Virginia of 1863, art. 8, sec. 1, it was provided:

"Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxes in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected, shall be taxes higher than any other species of property of equal value; but property used for education, literary, scientific, religious or charitable purposes, and public property, may by law, be exempted from taxation."

This provision has been construed by the Supreme Court of Appeals of West Virginia to inhibit the exemption of railroad property from taxation.

C. & O. R. R. Co. v. Miller, 19 W. Va. 408.

And the very point was affirmed by the United States Supreme Court in the same case. Same case, 114 U. S. 176.

The stream cannot rise higher than its source. If the legislature had no authority to exempt railroad property from taxation, neither had the City of Parkersburg. If the legislature was prohibited from exempting railroad property, so was the city.

Probasco v. Moundsville, 11 W. Va. 501;

1 Desty on Taxation, 481;

1 Beach on Pub. Corp., Sec. 1424;

[fol. 207] State v. Hannibal, 75 Mo. 208.

But, in addition to that, the only authority in the city to tax property in 1865, is found in the city charter of 1860, section 15, which provides:

"The council shall have authority to levy and collect an annual tax on real estate, personal property and tithables in the said town, and upon all other subjects of taxation under the revenue laws of the State; provided, that said tax does not exceed one per centum of the assessed value of said property, or the sum of two dollars upon every tithable therein."

This section has been construed to mean that all the personal property should be taxed, Powell v. Parkersburg, 28 W. Va. 711-714, and left no discretion in the town to exempt any property.

Point Pleasant Bridge Co. v. Town, 32 W. Va. 332.

This statute also provides that the tax should be an annual tax.

This of itself is a prohibition upon a commutation of city taxes forever for a sum in gross.

1 Desty on Taxation, 487 and 443 and 257.

Where a statute confers a power upon a corporation to be exercised for the public good, its exercise is not merely discretionary, but imperative. The words "powers" and "authority," in such cases may be construed "duty" and "obligation." Where a power is expressly given, no other or different means can be implied.

1 Desty on Taxation 257.

VI. The ordinances passed after the organization of the Parkersburg Branch Railroad Company, (1) were void for want of authority, the only consideration therefor resting upon the payment of \$7,500.00; (2) the city had no power and was forbidden thus to commute taxes.

[fol. 208] As has been before shown, the Parkersburg Branch Railroad Company was an entirely new and distinct corporation from

the Northwestern Virginia Railroad Company; that it acquired only such property as had been accumulated or was owned by the Northwestern Virginia Railroad Company at the date of the sale; that the Parkersburg Branch Railroad Company was in no way liable for the construction of the wharf at the foot of Court street, that the property acquired by the Northwestern Virginia Railroad Company after the mortgages of 1853, and conveyed to the town of Parkersburg before the sale in 1865 were not affected by such sale, and that the Parkersburg Branch Railroad Company had no claim thereto; and that there was not mutual liabilities between the town and said Parkersburg Branch Railroad Company. It therefore follows that the ordinances of 1865 and 1867, and 1870 constituted a new contract between the Parkersburg Branch Railroad Company and the town, by which the town granted certain new and valuable franchises to the railroad and attempted to renew the exemption from taxation upon the Northwestern Virginia Railroad property in consideration of \$7,500.00.

1. These Ordinances Were Void for Want of Power

As has been before shown, the city had no authority to grant exemptions unless the authority was unmistakably conferred by the legislature; and that none existed in 1865.

No change was made between the years 1865 and March 15, 1870, except that by the Code of 1868, sections 30 and 31, which went into effect April 1, 1869 (which was an amendment to the city charter of 1860, *Powell v. Parkersburg*, 28 W. Va. 699), it was provided:

"The council shall cause to be annually made up and entered upon its journal, an accurate estimate of all sums which are, or may become lawfully chargeable on such town or village, and which ought to be paid within one year, and it shall order a levy of so much as may, in its opinion, be necessary to pay the same."

"The levy so ordered shall be paid upon all dogs in the said town or village, and upon all the real and personal estate therein, subject [fol. 209] to State and county taxes; provided that the taxes so levied upon property shall not exceed one dollar on every one hundred dollars of the value thereof."

And as no authority is conferred by this act to grant the exemption, the ordinances to that extent are void.

2. Not Only was the Exemption Void for Want of Authority, but the City was Absolutely Forbidden to Grant Exemption from or Commutation of Taxes.

There is no difference in kind between exemption from and commutation of taxes. They are the same in effect. They both result from a bargain not to exercise the power of taxation. "The thing paid in commutation is but the price of exemption." To say: "I will commute your taxes for a certain sum, payable yearly in a lump, for ever or for a limited time," is nothing more than saying: "I will exempt you from taxation, for a consideration, wholly or partly."

The same authority which denies the power to exempt wholly, denies a partial exemption.

State v. Hannibal and St. J. R. Co., 75 Mo. 208;

Austin v. Gas Co., 7 S. W. Rep. 200.

So that the whole question reverts to the right to give away or sell the power to tax.

We have before shown that this power was not granted to the city and that under sections 30 and 31 of chapter 47 of the Code of 1868, and the Constitution of 1863, this power was forbidden the city.

C. & O. R. R. Co. v. Miller, 19 W. Va. 408;

Point Pleasant Bridge Co. v. Town, 32 W. Va. 332, and authorities cited above.

And besides, how is it possible for the city in pursuance with its authority to levy annually its taxes upon all the real estate and personal property in its jurisdiction, if it be not forbidden to accept a gross sum in lieu of its taxes for eternity?

VII.—The ordinances of 1865, 1867 and 1870 did not grant any [fol. 210] exemption to the Parkersburg Branch Railroad Company. The language of the ordinance is:

"An ordinance to permit the Northwestern Virginia Railroad Company to lay rails along certain streets of the town, and for other purposes; passed October 25, 1852, which together with the deed of conveyance and agreement between the President, Recorder and Trustees, and the said Northwestern Virginia Railroad Company, bearing date on the 8th day of June, in the year one thousand, eight hundred and fifty-five, and of record in the county of Wood, and State of West Virginia; and all other ordinances and parts of ordinances heretofore passed by the said town, and accepted by the Northwestern Virginia Railroad Company, and not repealed, and not conflicting with this ordinance, are hereby declared to be in full force, and binding on the City of Parkersburg, and the said Parkersburg Branch Railroad Company, as the successors, respectively, of the former parties thereto."

Exemption from taxation is never to be assumed unless the language used is too clear to admit of doubt. Nothing can be taken against the city.

Wilmington R. R. Co. v. Reid, 13 Wall. 264;

Pickard v. R. R. Co., 130 U. S. 637;

Wilmington v. Alsbrook, 146 U. S. 279.

The grant to one company of the rights and privileges of another, for the purpose of making and using a railroad, carries with it only such rights and privileges as were essential to the operations of the company.

Morgan v. Louisiana, 93 U. S. 217;

Pickard v. R. R. Co., 130 U. S. 637;

C. & O. R. R. Co. v. Miller, 114 U. S. 176;

Memphis v. Gaines, 97 U. S. 697.

Immunity from taxes is not one of these.
Same authorities.

[fol. 211] But if the immunity did pass:

VIII. (1) But if so, the exemption was strictly limited to the property of the North Western Virginia Railroad Company owned in 1855, or that it might thereafter acquire; (2) and the Parkersburg Branch Railroad Company, by the ordinances of 1865 and 1867, if valid, got only the exemption upon the property which it acquired from the Northwestern Virginia Railroad Company.

(1) The provis-ons of the ordinance and the covenant in the deed of June 8, 1855, have been quoted above and as has been above shown, they apply only to the property of the Northwestern Virginia Railroad Company.

The ordinances of 1865 and 1867 declared that the deed and contracts of June 8, 1855, "to be in full force and binding on the City of Parkersburg and the Parkersburg Branch Railroad Company, as the successors, respectively, of the former parties thereto."

These provisions of the ordinance do not pretend to grant to the Parkersburg Branch Railroad Company anything more than was granted to the Northwestern Virginia Railroad Company, i. e., an exemption on the property of the Northwestern Virginia Railroad Company, and is said by Mr. Justice Matthews, in *Memphis v. Berry*, supra, exemptions are "in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants construed strictissimi juris."

The Parkersburg Branch was a new corporation; it had acquired the property of the Northwestern Virginia Railroad; that property had been exempt; and the ordinances were a contract to continue to exempt that property. There is no word in them that would indicate otherwise.

C. & O. R. R. Co. v. Virginia, 94 U. S. 725 and 726.

The fact that only the property mentioned in these ordinances, contract and deed, was the property of the Northwestern Virginia [fol. 212] Railroad Company, does not carry with it the idea that the Parkersburg Branch Railroad Company's property was to be exempt.

Southwestern R. R. Co. v. Wright, 116 U. S. 231;
Annapolis & R. R. Co. v. Com'rs, 103 U. S. 1;
Wilmington R. R. Co. v. Alsbrook, 146 U. S. 279;
Bank v. Tennessee, 104 U. S. 493.

IX. The exemption granted to the Northwestern Virginia Railroad Company was limited to its property owned or afterwards acquired in the then limits of the town, and this exemption did not extend to property brought into town limits by extensions, so that the exemption granted to the Parkersburg Branch Railroad Company covered no property except that which was in the town limits as they were in 1855.

1. The first extension of Parkersburg was Stephenson's Addition, 1851, City Laws, p. 7.

The next extension was in 1863, City Laws, p. 22.

The next in 1887 and the last in 1891.

There is nothing in the original contract of June 8, 1855, that would extend the exemption to cover the area of the enlarged territory. And under the authorities above quoted and the case of *Powell v. Parkersburg*, supra, the property in the territory acquired by the city after June 8, 1855, would be taxable.

R. R. Co. v. Wright, 116 U. S. 231;

Bank v. Tennessee, 104 U. S. 493.

X. The bill does not show that the property which is sought to be exempted, is the property that was owned by the Northwestern Virginia Railroad Company, at the time of sale.

One who claims an exemption must show by his pleadings what property is exempt and the facts upon which the exemption is claimed.

1 *Desty on Taxation*, p. 135

A court of equity will not enjoin the collection of the whole tax, because in determining the valuation of the aggregate property, [fol. 213] exempt property may have been included as a factor.

Huck v. Chicago & R., 86 Ill. 352;

2 *Desty on Taxation*, 672;

National Bank v. Kimbal, 103 U. S. 733-734.

XI. The Baltimore & Ohio Railroad Company is a distinct corporation from the Parkersburg Branch Railroad Company. It is a stockholder in the Parkersburg Branch Railroad Company, and as such has no right to maintain a suit under an alleged arrangement with the Parkersburg Branch Railroad Company.

There never was a time — which these two corporations were identical.

C. & O. R. R. Co. v. Miller, 114 U. S. 176.

Memphis v. Berry, 112 U. S. 619.

Acts Legis. W. Va., 1872-3, chap. 88, pp. 227-8.

Acts Legis. W. Va., 1877, p. 138.

Acts Legis. W. Va., 1879, pp. 182-3-4.

Acts Legis. W. Va., 1882, p. 283.

Acts Legis. W. Va., 1883, p. 13.

The Baltimore & Ohio Railroad Company was the mere conduit through which the property of the Northwestern Virginia Railroad Company passed, retaining for the purchase money advanced the shares of capital stock of the new company.

Code of Virginia, 1860, chap. 61, sec. 29.

C. & O. R. R. Co. v. Miller, 114 U. S. 176.

People v. Schurz, 110 N. Y. 443.

The Parkersburg Branch Railroad Company is the legal owner of the corporate property, and not the stockholder, the Baltimore &

Ohio Railroad Company, and it must sue in its corporate name. And such stockholder can not use, unless the officers or agents of the railroad refuse to do so.

Park v. Petroleum, 25 W. Va. 108.

Dodge v. Woolsey, 18 How. 331.

[fol. 214] Rules in Equity, No. 94.

Cook on Stock and Stockholders & Corp. Laws, secs. 750 and 663.

XII. The contract for the exemption made in 1885 and 1867, if valid, was rendered unlawful and void by the Code of 1868, secs. 30 and 31, chapter 47, before the \$7,500.00 was paid.

This act was an amendment to the city charter (Powell v. Parkersburg, supra), and forbade any exemption, required an annual levy upon all the real and personal estate therein (Point Pleasant Bridge Co. v. Town, 32 W. Va.), and annulled the contract made by the ordinances of 1865 and 1867, as they had been in 1869 executed.

Apinal v. Com's., 22 How. 364.

List v. Wheeling, 7 W. Va. 526.

The parties must be held to have had notice that such contract was forbidden, and that the payment and receipt of the \$7,500.00 was illegal.

Thomas v. Richmond, 12 Wall., p.p. 349, 356:

XIII. The city could not ratify or confirm the contract and ordinance of 1855, or the ordinances of 1865 and 1867, by the ordinance of 1870 and receipt of the \$7,500.00; nor did the same work any estoppel upon the city.

The contract as above shown, was wholly beyond the power of the city, and forbidden by the Constitution of the State and charter of the city, and absolutely void and could not be ratified by the performance or acceptance of benefits thereunder.

1 Beach on Pub. Corp., sec. 217.

1 Dillon on Mun. Corp., sec. 457.

Sutro v. Pettit, 5 Am. St. Rept. 442.

Oakland v. Skinner, 94 U. S. 255.

Dixon v. Field, 111 U. S. 83.

Litchfield v. Ballou, 114 U. S. 190.

Thomas v. Richmond, 12 Wall. 349.

[fol. 215] Marsh v. Fulton, 10 Wall. 684.

Lewis v. Shrieverport, 108 U. S. 282.

In Thomas v. Richmond, the Court says, at p. 356: "In the case of municipal and other public corporations, another consideration intervenes. They represent the public and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. * * * Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of the bills as a currency by such

corporation without authority is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchises, which have been conferred upon it; and the receiver of the bills, being chargeable with the notice of the wrong, is *pari delicto* with the officers and should have no remedy."

In *Litchfield v. Ballou*, *supra*, says: The holders of the bonds and the agents of the city are *particeps criminis* in the act of violating that prohibition and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an applied *assumpsit* against a public policy so strongly declared."

This was a case in which a city sold its bonds, pocketed the money and refused to pay the bonds when due, because the issue was forbidden by the State Constitution.

In *Marsh v. Fulton*, at page 684, the Court says: "It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified."

In *Lewis v. Shrieverport*, *supra*, it was held: "Corporate ratification without authority from the legislature can not make a municipal bond valid, which was void, when issued for want of legislative power to make it."

XIV. The scope of the bill and the allegations show, as the fact is, that the Baltimore & Ohio Railroad Company is issuing under the cover of alleged exemption, granted the Parkersburg Branch Railroad Company, to avoid the payment of taxes on the property owned by the Baltimore & Ohio Railroad Company, which was at no time [fol. 216] exempt for the Northwestern Virginia Railroad Company, or the Parkersburg Branch Railroad Company.

In 1855, the Northwestern Virginia Railroad Company owned in the town limits, the property heretofore stated.

If the execution covered the property of said company in the town limits as extended by act of 1863, then the exemption covered all the property acquired by the Parkersburg Branch Railroad Company under the foreclosure sale.

As has been before shown, the exemption does not cover property of the Parkersburg Branch Railroad Company, situate in the territory annexed after 1865 to the city, which property has hereinbefore been set forth.

The property upon which the taxes for 1893, \$1,042.73, purports to be the property of the Parkersburg Branch Railroad Company in the city limits, as they are now.

The Baltimore & Ohio Railroad Company is assessed with no property except a part of the Ohio River bridge, which extends from the banks to the middle of the river, for city taxes.

But the fact is, a part of the Baltimore & Ohio Railroad Company's property, according to the bill, which never was exempt, was included in the property assessed to the Parkersburg Branch Railroad Company.

The result is that the city is not only defrauded out of taxes on the property of the Parkersburg Branch, which was not covered by the ordinances of 1865, 1867 and 1870, but on all the property of the Baltimore & Ohio Railroad Company.

XV. (1) The charters of the Northwestern Virginia Railroad Company and that of the Parkersburg Branch Railroad Company were subject to alteration and amendment at the pleasure of the Legislature.

(2) And the exemption granted by the contract and ordinance of 1855, and the ordinance of 1865, 1867 and 1870, could be withdrawn at any time without impairing the obligation of the contract. [fol. 217] The Charters of the respective companies were subject to amendment or alteration.

N. W. Va. R. R. Co. charter, section 2.

Code of Virginia, 1849, chapter 61, section 34.

Code of Virginia, 1860, chapter 61, section 34.

W. Va. Constitution of 1863, art. 11, sec. 5 & 8.

C. & O. R. R. Co. v. Miller, 114 U. S. 176.

2. The exemption could be withdrawn at any time without impairing the obligation of the contract.

(1) Because the contract was void. (2) Because the reservation was a part of the contract.

1. The contract was without legislative authority, therefore void, and could not prevent the legislature from exercising one of its pre-eminently legislative powers.

Wright v. Nagle, 101 U. S. 791.

City of New Orleans v. N. O. Water Works, 142 U. S. 79.

Hamilton Gas & Co. v. Hamilton, 146 U. S. 258.

The contract for the exemption was void for want of legislative authority. The State by the Constitution of 1863, the legislature by its Acts contained in the Code of 1868, chapter 47, sections 30 and 31; by the Constitution of 1872, article 10, section 9; by the Act of 1875, chapter 54, section 101; by the Act of 1877, chapter 109, section 1, and acts amendatory thereof. (Acts 1879, chapter 73, section 67; Acts 1881, chapter 12, section 67; Acts 1883, chapter 52, section 1, and Code of 1891, chapter 29, section 67) forbade and took away such power.

In *New Orleans v. Water Works*, supra, the Court, at page 83, says:

"Before we can ask to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment."

In *Hamilton Gas Light Co. v. Hamilton*, supra, at page 266, the Court says:

[fol. 218] "A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the State within the meaning of the Constitutional prohibition against the State laws impairing the obligation of contracts."

2. The right reserved to alter or amend entered into and became a part of the contract of exemption.

The power of taxation being an attribute of sovereignty, can only be exercised by the sovereign.

A municipal corporation, in the eye of the law, is the hand of the State by which the tax is laid and collected. When the power is delegated by the legislature, the corporation is considered as, *pro hac vice*, the agent of the State, acting for the benefit of the municipality.

1 *Desty on Taxation*, 472-3.

Merriwether v. Garrett, 102 U. S. 511-512.

Gilman v. Sheboygan, 2 Black. 510, 515.

Whiting v. West Point, 14 S. E. Rep. 698.

Sioux City R'y Co. v. Sioux City, 130 U. S. 98, 107.

In *Gilman v. Sheboygan*, at page 515, the Court says:

"The levying of taxes by the authorities of a county, city or town for their support, is as much an exercise of the taxing power as when levied directly by the State for its support. The State acts by the municipal governments, and their acts in levying taxes are as much the act of the State as if the State acted by its own officers."

Therefore the contract for the exemption with the State *quo ad* the city of Parkersburg became of the railroad's immunities and was subject to alteration and amendment by the legislature or city council.

Louisville Water Co. v. Clark, 143 U. S. 12-13-14.

As has been said, municipal corporations are the mere agencies of the government, and the conferring of the power of taxation is the exercising of the public and governmental power. It is the impairing of a part of the governmental power belonging to the State. There can be no delegation thereof in perpetuity and it is [fol. 219] always subject to the control or revocation by the legislature.

Williams v. New Jersey, 130 U. S. 189.

New Orleans Water Works Co. v. New Orleans, 142 U. S. 79.

Sioux City R'y Co. v. Sioux City, 138 U. S. 89.

All contracting with municipal corporations are bound to take notice of their powers and of the reservation of power in the legislature to alter or revoke their delegated powers.

1 *Beach on Pub. Corp.*, section 242.

Merriwether v. Garrett, 102 U. S. 511.

Williamson v. New Jersey, 130 U. S., 189-200.

Sioux City R'y Co. v. Sioux City, 138 U. S. 98.

But in addition to this, the railroad company's right to its franchises came from the legislature as a necessary incident thereto,

the right to exemption from liability to taxation, could only come direct from the legislature; or indirectly from legislative agency or instrumentality, a part of itself. And therefore, when the legislature not only reserves the power to control and destroy the power of the agent, but alter and amend the charter of the company, this reservation was a condition of the grant and the agent could make no arrangement with the company that would be superior to the power of the legislature, which the legislature could not alter or revoke.

Sioux City R'y Co. v. Sioux City, 138 U. S. 98-198.

Louisville Water Works v. Clarke, 143 U. S. 1 and authority cited.

This power to alter or amend is reserved by the Constitution of West Virginia, and can not be bargained away by the legislature, and a fortiori, by a municipal corporation.

New Jersey v. Yard, 95 U. S. 104, p. 111.

There is no element of private property in the right of taxation [fol. 220] conferred upon a municipal corporation, and it is not the subject of contract.

Williamson v. New Jersey, 130 U. S. 189, 199.

New Orleans v. N. O. Water Works Co., 142 U. S. 79, 90.

Sioux City R'y Co. v. Sioux City, 138 U. S. 98.

The reserved power to alter and amend must be read into as a part of this contract, and therefore the contract has not been violated.

Hoge v. R. C. Co., 99 U. S. 348, 354.

Sioux City R'y Co. v. Sioux City, 138 U. S. 98.

Louisville Water Works v. Clark, 143 U. S. 1.

Hailton Gas Light Co. v. Hamilton, 146 U. S. 258.

XVI. (1) There is no estoppel upon the State to assess and collect the taxes under sec. 67, chap. 29, of the Code; (2) nor upon the city having the benefit of them.

The State has assessed the taxes, the collection of which is sought to be enjoined; the contract of exemption was absolutely void because without authority and against the Constitution and Statutes; the assessing of taxes is a public duty, an exercise of sovereign power.

(1) The State is not bound by any statute of limitations nor barred by any laches of its officers, however gross, in the exercise of a public duty.

U. S. v. Beebe, 127 U. S. 338.

(2) Nor is there any estoppel upon the city by reason of any ratification, acquiescence or laches.

12 Am. & Eng. Ency. of Law, p. 565.

2 Dillon Munic. Corp., sec. 548.

1 Beach Pub. Corp., sec. 217.

Sutro v. Pettit, (Cal.) 5 Am. St. R. 442.

Marsh v. Fulton, 10 Wallace 676, 684.

Lewis v. Shrieveport, 108 U. S. 282.

Litchfield v. Ballou, 114 U. S. 190.

Thomas v. Richmond, 12 Wallace 349.

[fol. 221] We insist, therefore, that the complainant is without equity, and that the injunction should be dissolved and the bill dismissed.

Laird & Turner, of Counsel for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN
DISTRICT OF WEST VIRGINIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Feb. 8, 1923

And now on the 8th day of February, 1923, comes The City of Parkersburg, a municipal corporation, the defendant in the above styled cause, by its attorneys, Robert B. McDougale and F. P. Moats, the file with its petition for appeal this, its assignments of error, showing manifest error in the record in this cause as follows:

First. The Court erred in awarding the temporary injunction by its decree of April 10, 1894.

Second. The Court erred in awarding the temporary injunction by its decree of August 16, 1895.

Third. The Court erred in overruling the demurrer of The City of Parkersburg to the original and amended bills of complaint by its decree of July 13, 1897.

Fourth. The Court erred in its decree of February 7, 1923.

1st. In striking from the record the separate answers of the City of Parkersburg to the original and amended bills of complaint.

2nd. In overruling the motion of the City of Parkersburg to dis-[fol. 222] miss this suit and dissolve the temporary injunctions awarded on the 10th day of April, 1894, and the 16th day of August, 1895, respectively.

3rd. In making permanent the temporary injunctions aforesaid without affording the City of Parkersburg the opportunity of making other or further defense thereto.

The City of Parkersburg, by Robert B. McDougale, F. P. Moats, Counsel.

STIPULATION TO PREPARE TRANSCRIPT OF RECORD AND PRINT SAME
UNDER RULE 23 OF UNITED STATES CIRCUIT COURT OF APPEALS—
Filed February 9th, 1923.

It is hereby stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above styled cause, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va.; and that it be printed under the supervision of the Clerk of that Court, in accordance with Rule 23.

J. W. Vandervort, of Counsel for Baltimore & Ohio Railroad Company. R. B. McDougle, F. P. Moats, Counsel for the City of Parkersburg.

Feby. 9th, 1923.

MEMORANDUM

Petition for Appeal, filed February 8th, 1923.

Order Allowing Appeal, filed February 8th, 1923.

[fols. 223 & 224] Appeal Bond, Penalty \$500.00, dated February 10th, 1923.

Filed February 13th, 1893.

Obligors: The City of Parkersburg, by: J. S. Dunn, Mayor, and J. S. Dunn, individually.

Conditioned for costs only.

Citation dated February 9th, 1923.

Service of Citation accepted February 13th, 1923.

Filed February 13th, 1923.

UNITED STATES OF AMERICA,
Northern District of West Virginia, ss:

CLERK'S CERTIFICATE

I, I. Wade Coffman, clerk of the District Court of the United States for the Northern District of West Virginia, do hereby certify the foregoing to be a true and complete transcript of the record of the proceedings had in said court, in the case of The Baltimore & Ohio Railroad Company, a corporation, versus The City of Parkersburg, West Virginia, a municipal corporation, and others, lately pending in said court, as the same appear on file and record in my office at Parkersburg, in said District.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Parkersburg, in said District, this 26th day of February, A. D. 1923.

I. Wade Coffman, Clerk U. S. D. C. N. D. W. Va. (Seal.)

**PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.**

No. 2101.

The City of Parkersburg, a Municipal Corporation, Appellant,

versus

The Baltimore & Ohio Railroad Company, a Corporation, Appellee.

Appeal from the District Court of the United States for
the Northern District of West Virginia,
at Parkersburg.

February 28, 1923, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, appeal bond and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of F. P. Moats and Robert B. McDougle is entered for the appellant.

March 8, 1923, the appearance of J. W. Vandervort, Frank W. Nesbitt and Mason G. Ambler is entered for the appellee.

March 22, 1923, twenty-five copies of the printed record are filed.

ARGUMENT OF CAUSE.

May 22, 1923 (May Term, 1923), cause came on to be heard before Woods and Waddill, Circuit Judges, and Groner, District Judge, and is argued by counsel and submitted.

OPINION.

Filed December 14, 1923.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 2101.

The City of Parkersburg, a Municipal Corporation, Appellant,

versus

The Baltimore & Ohio Railroad Company, a Corporation, Appellee.

Appeal from the District Court of the United States for
the Northern District of West Virginia,
at Parkersburg.

(Argued May 22, 1923. Decided December 14, 1923)

Before Woods and WADDILL, Circuit Judges, and GRONER,
District Judge,

FRANCIS P. MOATS and ROBERT B. McDOUGLE for Appellant, and MASON G. AMBLER, J. W. VANDERVORT and FRANK W. NESBITT for Appellee.

WOODS, Circuit Judge:

The vital question to be decided is whether the City of Parkersburg has lost the right to collect taxes on property of the Baltimore & Ohio Railroad Company situated in the city.

The right to be perpetually free from city taxation is asserted by the railroad company on these grounds: *1st*, exemption or commutation by a city ordinance of June 8, 1855, a contract with the city of the same date and subsequent ratification thereof; *2nd*, adjudication of July 13, 1897, that the attempted exemption or commutation was valid; *3rd*, laches of the city in acquiescing in the assertion of the validity of the exemption or commutation from 1855 to 1893, and from 1897 to 1921.

The material facts will appear from a summary of the bills and the course and status of the litigation.

On April 10, 1894, the Baltimore & Ohio Railroad Company filed a bill in the Circuit Court for the District of West Virginia and on August 6, 1895, an amended and supplemental bill to enjoin the City of Parkersburg from the threatened enforced collection of \$1042.73 taxes claimed for the year 1893. The bill set out an ordinance of the president, recorder and trustees of the Town of Parkersburg and a contract made in pursuance thereof between the town and the North Western Virginia Railroad Company, both dated June 8, 1855. Under the ordinance and contract the railroad company was to receive from the town the right to the free and exclusive use and occupation for railroad purposes of the lands, banks, shores, and water rights within described boundaries, and "the right to lay and use railroad tracks with suitable switches and turnouts along and across such of the streets and alleys of the said town as they may deem necessary to connect their stations and other improvements." These rights were subject to the obligation of the railroad company to keep the streets open for traffic, to grade and keep in repair the portion of the streets

between side-walks and tracks, and to construct and maintain a certain culvert. All the property of the railroad company then owned, or thereafter acquired, used for railroad purposes, was to be "free from all town taxes, assessments and charges." The consideration to the town was the grant of all the right, title and interest of the railroad company in lands conveyed to it by Jackson and others, to be used by the town exclusively for wharfage purposes, the construction of two wharfs on the Ohio River, one of them at the foot of Court Street, subject to the condition that rates for wharfage should not exceed the lowest rate at certain cities named, except by consent of the railroad company, and that the railroad company should have free wharfage. By the records of the town council of July 13, 1855, it appears that the ordinance and contract were for the adjustment of conflicting claims of title to the banks of the Ohio and Kanawha Rivers.

On February 15, 1865, at a foreclosure sale, the Baltimore & Ohio Railroad Company became the purchaser of the property of the North Western Virginia Railroad Company and thereafter conducted business under the name of Parkersburg Branch Railroad Company. After the foreclosure sale, on May 30, 1865, and May 10, 1867, ordinances were passed declaring the ordinance of June 8, 1855, to be in full force and virtue, but making no special reference to the attempted tax exemption. The ordinance of May 10, 1867, extended the Railroad's use of the streets in the city upon condition that the railroad company, in accordance with the agreement of June 8, 1855, with the North Western Virginia Railroad Company, should construct the wharf on Court Street to be the property of the city. On March 15, 1870, in consideration of the payment of \$7500, the railroad company was released from its obligation to build the wharf on Court Street.

On these facts, set out in the bill and exhibits, the court on April 10, 1894, issued a temporary injunction *ex parte*. The city on May 7, 1894, filed a demurrer to the original bill on the ground that it appeared from the face of the bill that complainants were not entitled to the injunction asked. Afterwards, on June 14, 1894, the city filed its answer alleging lack of power in the city council to exempt the railroad company from taxes or

to commute taxes in the manner set up in the bill, and setting up other defenses. On June 20, 1894, plaintiff filed exceptions to the answer of the city as impertinent and immaterial. Plaintiff filed an amended and supplemental bill on August 16, 1895, and obtained another temporary injunction. On September 3, 1895, the city demurred to the amended and supplemental bill, setting out its grounds of objection with more detail.

Under the bills and demurrers the validity of the attempted tax exemption was elaborately argued before Hon. Nathan Goff, Circuit Judge. The demurrers were overruled on July 13, 1897, in a formal decree containing this provision: "And thereupon came the defendants and asked leave to file their separate answers, heretofore tendered in this cause, to the original bill and the same being considered by the Court and ordered filed, and leave is given them to file answer to said amended and supplemental bill within thirty days from this date."

Thereafter, on August 11, 1897, the city filed its answer to the amended and supplemental bill reiterating the defenses set up in the answer to the original bill, again alleging the invalidity of the ordinances and contracts of the city council in so far as they purported to exempt the North Western Railroad Company and the Baltimore & Ohio Railroad Company from taxes, and alleging that even if the attempted exemption of June 8, 1855, of the North Western Virginia Railroad Company was valid, the Baltimore and Ohio Railroad Company did not acquire such exemption by purchase at the foreclosure sale.

On June 9, 1920, an order was made in the District Court striking the cause from the docket. On January 17, 1921, on motion, an order was made restoring the cause to the docket, the order reciting that it appeared to the court "from the last order entered in said cause that the same was heretofore submitted to the Court upon the motion of the plaintiff to perpetuate a temporary injunction theretofore granted, and upon the motion of the defendant, the City of Parkersburg, to dissolve said temporary injunction, and that neither of said motions, so far as the record discloses, have been disposed of by the Court."

On June 3, 1922, counsel for the city moved that the cause be set for hearing. Plaintiff's counsel objected and

moved to strike out the answers "upon the ground that the said The City of Parkersburg has acquiesced in the injunctions awarded herein on the 10th day of April, 1894, and the 16th day of August, 1895, and through the lapse of more than a quarter of a century has failed to take any action looking to the dissolution of the said injunctions, and has long since abandoned its claim for the taxes, the collection of which was restrained by said injunctions, and has failed to do or offer to do equity herein, and for other reasons appearing in the record."

On January 10, 1923, counsel for the city moved to dissolve the preliminary injunctions and dismiss the suit.

By final decree, dated February 7, 1923, the answers of the City of Parkersburg were stricken from the record and the preliminary injunctions were made permanent. The appeal is from this order.

The Town of Parkersburg was chartered in 1820. Neither the original charter nor any amendment confers, either directly or by implication, power to exempt property from taxation. Taxation being an essential function of government the authority to relinquish it must be clearly conferred and every doubt will be resolved against the existence of the power of exemption and against the averment that such a power has been exercised. *Wilmington & Weldon Railroad v. Alsbrook*, 146 U. S. 279, 294; *St. Louis v. United Railways Co.*, 210 U. S. 266, 273; *J. W. Perry Co. v. Norfolk*, 220 U. S. 472, 480; *Whiting v. West Point*, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860, 29 A. S. R. 750; *Richmond v. Virginia Railway & Power Co.*, 124 Va. 529, 98 S. E. 691; 3 *Dillons Municipal Corporations* (5th ed.), sec. 1310.

All attempts of the municipal council to exempt from taxation or to ratify such attempted exemption, being without legal foundation, were absolutely void; and no omission of the council to levy and collect taxes could operate to confer the right of exemption by estoppel. *Marsh v. Fulton County*, 10 Wall 676; *Loan Association v. Topeka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U. S. 487, 501; *Daviess County v. Dickinson*, 117 U. S. 657; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 136; *Barnett v. Denison*, 145 U. S. 135, 139; *Brenham v. German American Bank*, 144 U. S. 173, 183. "The protection of public corporations from such unauthorized acts

of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions do so at their peril." *Thomas v. City of Richmond*, 12 Wall. 349.

It is true that it has been held in numerous cases that a city may make a valid contract to pay or allow the whole or a part of the taxes as compensation for a continuous service rendered, such as furnishing water to the city. This is put on the ground that in such case there is no exemption from taxes but an agreement in substance that the amount of the taxes should be paid from year to year as compensation for the current service rendered. *Conery v. New Orleans Water Works Co.*, 51 La. A. 910, 7 So. 8; *Board of Councilmen v. Capital Gas & Electric Light Co.*, 29 S. W. 855; *Town of Canaan v. Enfield Village Fire District*, 74 N. H. 517, 70 Atl. 250, 258; *Maine Water Co. v. City of Waterville*, 93 Me. 586, 45 Atl. 830; *Phillips v. City of Portsmouth*, 115 Va. 180, 78 S. E. 651; *Bartholomew v. City of Austin*, 85 Fed. 359; *Grant v. Davenport*, 36 Iowa 405; *Montclair Water Co. v. Town of Montclair*, 8 N. J. 573, 79 Atl. 258; *Alpena City Water Co. v. City of Alpena*, 130 Mich. 413, 90 N. W. 323.

Stearnes v. Minnesota, 179 U. S. 223, is relied on as sustaining the validity of the ordinance and contract of exemption. Minnesota received a grant of land from the United States "for the purpose of aiding in the construction of a railroad from St. Paul to the head of Lake Superior." The state granted the land to the Lake Superior & Mississippi Railroad for railroad purposes and no other. In consideration of the grant the railroad agreed to pay, on or before the first day of March of each year, three per cent of the gross earnings "in lieu and in full of all taxation and assessments." The lands were however to be subject to the usual land tax as soon as sold or leased. Other lands involved in the litigation were granted to the Northern Pacific Railroad Company by the United States, the railroad being required by its congressional charter to obtain the consent of any state through which it might pass before commencing work. The State of Minnesota gave its consent to the construction of the road on the condition that the lands and other property of the railroad company should pay the same

X per cent. of its gross earnings to the state as had been exacted of the Lake Superior & Mississippi Railroad, in full and in lieu of all taxes. Afterwards the legislature of Minnesota undertook by statute to subject the property of both railroads to the taxes levied on all other property in the state, *in addition* to the percentage of gross earnings stipulated in the grants to be in full of all taxes. It is to be observed that the question was not one of complete exemption from taxation, but of the right of a state to grant land and affix as a condition of the grant the measure of taxes which the grantee was to pay each year. The majority of the Court held that the method of taxation provided by the grant was not an exemption; that it was by virtue of the contracts fixing the tax that land not before subject to taxation as property of the state and of the United States was made taxable; that in bringing it in as taxable property the state could attach any condition precedent it saw fit; and that therefore the state could not impose the current rate of taxation for other property in addition to the three per cent. of gross earnings contracted to be in full of all taxes. None of this reasoning nor the conclusion of the Court
+ can apply to the facts in the case before us. Four judges dissented from the majority view, insisting that the contract was an attempt to exempt property from taxation and impose an unequal tax in violation of the state constitution, and further that the statute of the state exacting the three per cent. of gross earnings in addition to the tax imposed on other property was in violation of the constitutional requirement of uniform taxation.

X No authority has been cited, and we think none can be found, holding that a municipal council, without legislative authority, may for a lump consideration in land or money bargain away the power and duty to tax. Statement of the claim of such power is its own refutation. If a municipality could bargain with one tax-payer to accept a gross sum in commutation of all future taxes it could so bargain with all. The exercise of such a power would destroy the continuous flow of financial resources essential to the life of the municipality and implicit in the word taxation.

But even if the ordinance and contract of June 8, 1855, had been a valid exemption from taxation of the North Western Virginia Railroad Company, the exemp-

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tion would not extend to the Baltimore & Ohio Railroad Company, alleged to be the real purchaser at the foreclosure sale made to the Parkersburg Branch Railroad Company in February, 1865. Immunities and exemptions were not mentioned in the mortgage, nor in the deed of conveyance under foreclosure. Conveyance of the property of a railroad with the franchises, rights and privileges does not carry to the purchaser at a foreclosure sale the right of exemption from taxation which had been enjoyed by the mortgagor. *Rochester Railway Co. v. Rochester*, 205 U. S. 236; *Yazoo & Mississippi R. R. Co. v. Vicksburg*, 209 U. S. 358; *Wright v. Georgia R. R. & Banking Co.*, 216 U. S. 437; *Morris Canal Co. v. Baird*, 239 U. S. 126, 131.

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Therefore the Baltimore & Ohio Railroad Company, as purchaser under the name of Parkersburg Branch Railroad Company, took the property in February, 1865, stripped of the tax exemption in favor of the North Western Virginia Railroad Company, if it had ever existed.

The Baltimore & Ohio Railroad Company avers that even if this be true it was exempted from taxation by the ordinances of May 30, 1865, and May 10, 1867, passed after the foreclosure sale.

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Assuming, without deciding, the requirement of the constitution of West Virginia of 1863 that all taxation shall be equal and uniform to apply only to taxation by the state and not to that by municipal corporations, we think the city ordinances of May 30, 1865, and May 10, 1867, are unavailing to protect the Baltimore & Ohio Railroad Company from taxation. These ordinances in general terms declare the ordinance of June 8, 1855, and all other ordinances accepted by the North Western Virginia Railroad Company and not repealed, to be binding on the city and on the Parkersburg Branch Railroad Company, "as the successors to the former parties thereto." No mention is made of exemption from taxation attempted by the ordinance of June 8, 1855. These ordinances fail to relieve the Baltimore and Ohio Railroad Company of its taxes for total want of power in the council to exempt from taxation.

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It follows that all the attempts of the municipal council by ordinances and contract to exempt the railroad company from taxation were absolutely void. X

The city has not lost its right to collect the tax by adverse adjudication in this litigation. An order or decree on a demurrer and the entry of final judgment thereon is an adjudication of a point involved. *Bissell v. Spring Valley Township*, 124 U. S. 225; *Wiggins Ferry Co. v. Ohio & Mississippi Railway*, 142 U. S. 396. But an order overruling a demurrer is not an adjudication of the merits when there is no final decree or judgment and leave is granted to file an answer raising the same question made by the demurrer. Here, in overruling the demurrer to the bill, the defendant was given leave to file an answer putting in issue questions made by the demurrer. This was refusing to decide the issue on demurrer, leaving it for decision on the final hearing.

"A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action, is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, *unless leave to amend or plead over is granted*. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action. Under such circumstances, the trial of an issue raised by a demurrer which involves the merits of the action is, in our opinion, a trial of the action within the meaning of the act of March 3d, 1875." *Alley v. Nott*, 111 U. S. 472, 475. *Virginia v. West Virginia*, 206 U. S. 290; *Kansas v. Colorado*, 185 U. S. 125; *Anderson v. Olson*, 188 Ill. 502, 59 N. E. 239; *Foster-Eddy v. Baker*, 192 Fed. 624. The limitation of the general doctrine expressed in the words we have italicized applies. The rights of the parties were, therefore, unadjudicated and the cause was pending for trial when the final decree for a permanent injunction was entered February 7, 1923.

The argument is made that the city has lost its right to collect the tax for the year 1893, the tax enjoined, and taxes for all subsequent years as well, by laches, in that the municipal authorities failed to attempt to collect the

taxes from 1855 to 1893, and after the temporary injunction, in 1897 failed to bring the cause for a final hearing until 1921.

When an act is within the general scope of municipal power, and is not expressly forbidden by law, the conduct of its officers may be attributed to a municipality as laches or estoppel according to circumstances. Illustrative cases are *Bank v. Dandridge*, 12 Wheat. 63, and *Boone v. Burlington*, 139 U. S. 684. But the attempt to exempt from taxes being entirely without the scope of its power, the council in attempting to confer exemption did not represent the municipality. The effort to bind the city by the attempt was of no more effect than would have been an effort by the council to legislate or make contracts for another municipality or the entire state. In that case no laches or attempt at ratification by the council could bind the city. "A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 59; *Jacksonville etc. Railway v. Hooper*, 160 U. S. 514, 524, 530; *California Bank v. Kennedy*, 167 U. S. 362, 368; *Marsh v. Fulton County*, 10 Wall. 676; *Parkersburg v. Brown*, 106 U. S. 487, 501; *Daviess County v. Dickinson*, 117 U. S. 657; *Flowers v. Logan County*, 137 A. St., Note, 357, 368, 375; *Neacy v. Drew*, 175 Wis. 348, 187 N. W. 218; *Mayor of Hogansville v. Planters Bank*, 27 Ga. App. 384, 108 S. E. 48; *Milster v. Spartanburg*, 68 S. C. 33; 2 *Dillon on Municipal Corporations*, (5th ed.) sec. 951; *Bigelow on Estoppel*, (5th ed.) 466.

As to attempts to found a right of action on a void contract and acts done under it, the Court said in *Thomas v. Railroad Company*, 101 U. S. 71, 86, "To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its

parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts."

Contrary to these express decisions of the Supreme Court, the suit of the Baltimore & Ohio Railroad Company is a plain attempt to obtain the affirmative relief of injunction by virtue of void ordinances and a void contract, and omissions and actions alleged to constitute laches and ratification. Such a suit is without foundation.

Nor can we agree, as held by the District Court, that the plaintiff, Baltimore & Ohio Railroad Company, is entitled to have a final decree for a permanent injunction in its favor on the ground that the city, the defendant, failed to press the cause for a hearing. The railroad company was the actor. The temporary injunction adjudged nothing and had no effect except to stay the collection of the tax until the final decree. The decree of the District Court makes the deliberate failure of the complainant to press for a final decree equivalent to a final decree in its favor. Neglect of a plaintiff, the actor in the cause, to prosecute his case to final judgment may well result in its dismissal; but the neglect of the defendant who sought no affirmative relief, or the neglect of both parties to bring the cause to a final hearing is not a ground for granting affirmative relief against the defendant without a trial on the merits. Surely the defendant was guilty of no delay of which the plaintiff was not equally guilty. If the parties are equally guilty of delay, neither can avail itself of the delay of the other as laches. *Marshall v. Meyer*, 118 Iowa, 508, 92 N. W. 693, 694; *Mays v. Morrell*, 65 Oregon 558, 132 Pacific 714; 21 C. J. 215; *Kansas City Southern R. Co. v. Boles*, 88 Ark. 478, 115 S. W. 375, 378; *Georgia R. & Banking Co. v. Wright*, 124 Ga. 596, 53 S. E. 251, 266. Relieving the plaintiff of the responsibilities and penalties of neglect to prosecute and imposing them on the defendant, is reversing the rule of law.

The last position taken by the complainant is that the City of Parkersburg must abide by the void ordinances and contract until it offers to restore the consideration received from the railroad companies for the exemption. If the North Western Virginia Railroad Company had continued business and continued to own the railroad

property in Parkersburg and were the plaintiff here, it could set up in this equity suit that it was entitled to a return of the property known as the Jackson lots and the value of its use if that could be made without detriment to the city, or to payment of the value of the property to the city and interest. In the adjustment the North Western Virginia Railroad Company would be required to account for the value of all the benefits received by it in the transaction with interest, and for the taxes it should have paid for all the intervening years with interest. This we understand would be the result of the principle sanctioned in *Louisiana v. Wood*, 102 U. S. 294; *Parkersburg v. Brown*, 106 U. S. 487, 503; *Chapman v. Douglas County*, 107 U. S. 348, 360; *Salt Lake City v. Hollister*, 118 U. S. 256, 263; *Pennsylvania Railroad v. St. Louis &c. Railroad*, 118 U. S. 317, 318; *Railway Companies v. Keekuk Bridge Co.*, 141 U. S. 371, 389; *Luther v. Wheeler*, 73 S. C. 83, 52 S. E. 874.

But the property conveyed and the benefits conferred by the North Western Virginia Railroad Company on the city was for the consideration of exemption of the North Western Virginia Railroad Company from its taxes. This promise of exemption though void was actually performed and the North Western Virginia Railroad Company was in fact exempted from taxation for the whole period of its existence after June 8, 1855, the date of the ordinance and contract, until its property was sold in February, 1865. The city is now barred by the statute from recovery of these taxes. The North Western Virginia Railroad Company has therefore received all that the city council attempted to promise for the city in consideration of the conveyance to the city of the Jackson lots; and it has no claim against the city either legal or equitable for failure of consideration.

It is equally evident that the Baltimore & Ohio Railroad Company has no valid claim. As we have seen, the ordinance and contract of June 8, 1855, even if they had been valid would have conferred no right of exemption on the Baltimore & Ohio Railroad Company, purchaser at the foreclosure sale. It follows that the Baltimore & Ohio Railroad Company, the plaintiff here, has no equity to require return of the Jackson lots conveyed by the North Western Virginia Railroad Company to the city as consideration for exemption of the property of the

North Western Virginia Railroad Company or an accounting of their value to the city.

The ordinance of May 30, 1865, contains no statement of any consideration whatsoever going from the Baltimore & Ohio Railroad Company to the city, and hence it may be left out of consideration.

The ordinance of May 10, 1867, bears the title "An Ordinance to Widen Washington Street, and to Authorize the Parkersburg Branch Railroad Company to Extend Their Track Through the City to the Ohio River." Sections 1, 2 and 3 all relate to privileges and powers granted to the Baltimore & Ohio Railroad Company, and they are very valuable privileges and powers. None of them impose any duty from the Railroad Company to the city. By section 4 the railroad company is required to put in a wharf at the foot of Court Street as one of the conditions of the powers and privileges granted in the preceding sections of the ordinance. It is a distinct and separate requirement of the railroad. Sections 5, 6, 7, and 8 relate entirely to the widening of Washington Street to sixty feet. Section 5 provides that it shall be widened to sixty feet. Sections 6 and 7 provide for the acquisition by condemnation of the land required for the purpose by the city. Section 8 provides that the land required shall be conveyed to the City; but it provides further that if the railroad company should determine to construct an extension on any of the land so condemned, then the land shall be conveyed to the railroad company with the provision that it shall leave a pass-way of seven feet and spaces between the piers on Washington Street free and unobstructed. Section 9 provides that the city shall issue its bonds for \$15,000 to pay for the land so required and that the railroad company shall pay the remainder not met by the sale of the city bonds.

From this statement it is evident that the railroad company received very valuable rights and privileges from the city. For these it assumed only two obligations, that imposed by section 4 to build a wharf at the foot of Court Street, and the other to pay for the land condemned any balance after the application of the proceeds of the city's bonds for \$15,000. There is no allegation in either bill that the railroad company paid anything at all for the acquisition of the property. The only thing, therefore, that could possibly be regarded as

a consideration by the railroad company for the many rights and privileges granted in the ordinance of May 10, 1867, was the undertaking to construct a wharf at the foot of Court Street. The ordinance amending the ordinance of May 10, 1867, provides for the payment of \$7500 as the consideration of the release of the railroad company from the obligation to build the wharf at the foot of Court Street.

With this analysis, reading in connection the ordinances of May 30, 1865, May 10, 1867, and the ordinance of March 15, 1870, amending the ordinance of May 10, 1867, it is evident that the obligation to build the wharf at the foot of Court Street, and the payment of \$7500 for release from that obligation was not a consideration for exemption from taxation which is not mentioned, but for the numerous privileges and rights specifically conferred on the railroad company by these ordinances. This is made all the more evident by the fact that section 3 of the ordinance of May 30, 1865, and the same section of the ordinance of May 10, 1867, declaring in force the ordinance of June 8, 1855, and the deed executed at the same time, relate exclusively to permission to the railroad company to use steam on their trains, and make no mention of tax exemption.

We cannot construe these ordinances as expressing beyond doubt an intention to exempt the Baltimore & Ohio Railroad Company from taxation, and expressing that the \$7500 paid in discharge of the obligation to build the wharf at the foot of Court Street was a consideration for an attempted exemption from taxation. Such a construction would violate the rule so well established that the power to exempt and the intention to exempt must be clear beyond doubt.

Take, however, the contrary view and assume in favor of the plaintiff that the \$7500 paid by the plaintiff March 15, 1870, was paid entirely as a consideration for the exemption from taxes. Give the plaintiff credit for the entire sum of \$7500 and interest from March 15, 1870, as a valid equitable claim against the city in favor of the plaintiff. The city would have the clear equity to set off against this debt of \$7500 the taxes and interest thereon owing by the plaintiff from February 15, 1865, the date when plaintiff acquired the railroad property, to January 1, 1894. The aggregate of these taxes for these twenty-

nine years owing to the city and interest thereon would far exceed the \$7500 and interest considered as a payment for exemption from taxation. Thus it plainly appears that the plaintiff has received in illegal exemption from taxes which it is now too late for the city to recover, much more than the consideration paid for the exemption; and that it has no legal or equitable claim against the city.

The plaintiff's claim for exemption being without foundation and the record disclosing no ground for equitable relief, the District Court should have dismissed the bill.

The decree of the District Court is

Reversed.

WADDILL, Circuit Judge, dissenting:

The defendant in error, Baltimore & Ohio Railroad Company, hereinafter called the Railroad, on the 10th of April, 1894, filed its bill in equity in the United States Circuit Court for the District of West Virginia, against the plaintiff in-error, the city of Parkersburg, hereinafter called the City, the purpose of which was to enjoin the collection of a city tax for the year 1893 of \$1042.73, claimed to be due by the railroad to the city; and by an amended bill filed on the 6th of August, 1895, the railroad company sought to enjoin the collection of another sum of \$1042.73, city tax for the year 1894. Injunctions were awarded on the 10th of April, 1894, on the first bill, and on the 16th of August, 1895, on the amended bill. Whereupon the city appeared and filed its demurrer to the original bill, and afterwards, on the 14th day of June, 1894, filed its answer, to which answer the railroad on the 20th of June, 1894, filed exceptions, and on the 13th of September, 1895, the city filed its demurrer to the amended bill, setting out its defense in greater detail. Upon these pleadings, and a motion to dissolve the injunction, the cause was elaborately argued on the 2nd of October, 1895, and submitted to the judge for consideration, with leave to file written or printed briefs by the first day of the following December. On the 13th of July, 1897, the demurrers were overruled, the injunctions allowed to

stand, and the city was given leave to answer the amended bill which was filed on the 11th of August following. The cause remained in this condition until it appears that by an order entered on the 11th of January, 1911, some 14 years later, the city attorney was permitted to withdraw the papers from the files, with a view of inspecting them, and on the 17th of January, 1921, 10 years later, an ex parte order was entered reinstating the cause upon the docket, the same having been as appears from the recitals of the last named decree, removed from the docket on the 9th of January previously. On the 3rd of June, 1922, the cause was submitted to the judge of the court upon the railroad's exceptions to the answer, and upon its objections to the further hearing of the cause, because of the city's long acquiescence in the injunction granted as aforesaid, and upon the city's further motion made on the 10th of January, 1923, to dissolve the preliminary injunctions theretofore awarded, and dismiss the bill. The court by a final order entered on February 7th, 1923, upon full consideration of the pleadings and papers in the cause, and the several motions presented by the parties, sustained the exceptions filed by the plaintiff to the defendant's answer, refused to dismiss the plaintiff's bill, and perpetuated the injunctions theretofore granted, from which order this appeal was taken.

The litigation grows out of a certain contract and deed entered into between the North Western Virginia Railway Co., predecessor of the plaintiff, Baltimore & Ohio Railroad, and the Town of Parkersburg, predecessor of the defendant the City of Parkersburg, whereby exchanges of properties were contracted for and entered into between the city and railway company, pursuant to an ordinance of the town theretofore duly passed, and which was subsequently confirmed and ratified by ordinances of the city of Parkersburg, passed in favor of the successor company, namely, the Parkersburg Branch of the Baltimore and Ohio Railway Co., and of the latter company.

The effect of this contract, deed and ordinances, and what is the true interpretation and meaning of the same, and whether the contract thus entered into may be avoided by reason of the provisions relieving the railway company from payment of city taxes upon certain

property enumerated within its corporate limits during the use and occupation thereof by the railroad, are the subjects to be determined here; the city's contention briefly being that the same constituted a naked exemption from taxation, and was, with everything done in connection therewith wholly void; whereas, the railroad claims that the city was fully authorized to pass the ordinances and make and carry out the contract in question, and that the same in no sense constituted a naked exemption from taxation, as contended for, but was a commutation of such taxes by the city in consideration of the price of property conveyed to it, and moneys paid which constituted a valuable consideration therefor, and that the transaction was in all respects fair and favorable to the city. That these contractual undertakings thus entered into between the city and the railroad constituted a valid and binding contract and agreement between them, and was a valuable property right which enured directly to the benefit of the railroad, which, as well as its predecessor in title, paid a valuable consideration therefor, and can not be taken away or avoided or annulled by the defendant city, is manifest, it having observed and carried out the same for some 39 years prior to the filing of the original bill herein, and subsequently acquiesced for more than a quarter of a century in the decree and order of the court overruling its defense made to the plaintiff's bill, and submitted to the injunction enjoining the effort to collect such taxes.

Five questions are apparently presented for consideration, though the assignments of error are in general terms, and do not specifically point out the errors complained of, viz: the validity of the exemption; whether the same passed to the plaintiff railroad at the judicial sale at which it acquired its title; how far laches applies to the transaction; the effect of the injunction granted in connection with the two years taxes specifically involved, and the overruling of the demurrer; and the right of the railroad to seek restitution for its losses in the event of the transaction being declared invalid. ① ② ③ ④

These several contentions will now be considered.

First. The character of the exemption, and the right to make the same.

In my view of this case, it will not be necessary to pass upon or give great consideration to the question so earnestly pressed and for which much citation of authority is given, viz: the right of the city to make a naked exemption of the payment of taxes to the railroad. Admittedly, there is much force in what is said on this subject, when applicable, and of course, the right to make exemption from taxation is one that should be sparsely exercised, though in no event could it be availed of as a defense here, where those making the claim have taken a contrary view and slept upon their rights for well-nigh three-quarters of a century. This is not a case of naked exemption, to which the decision relied on are properly applicable. At the date of entering into the contract in question, there was nothing in the organic law, the statute law, judicial decisions or public policy of the state of Virginia that forbade the exemption of property from taxation. On the contrary it was the well recognized policy of the State so to do. *Danville v. Shelton*, 76 Va. 325, 334; *City of Petersburg vs. Petersburg*, 78 Va. 331, 335. It may be said that if the city of Parkersburg, clothed with power and authority to levy, assess and collect city taxes, was not thereby permitted to make exemption from taxes, it is but a technical objection. The city was clothed with the fullest power to make contracts and acquire property for the city, being expressly given the power to pass laws, by-laws and ordinances as it might deem necessary for the internal safety and convenience of the town; and there will be found no limitation, either express or implied, in the charter of the town that would forbid it from entering into an undertaking and making contracts in the town and city's behalf; and to that end exercise its best judgment in making such contracts for the good of the city.

Considering the case as one involving a commutation of taxes, as distinguished from naked exemption from payment thereof, the question for determination is what is meant by commutation of taxes, and what is the law on that subject. That it is but the remuneration for payment of taxes, as distinguished from an exemption therefrom, would seem to be too plain, if there was no authority on the subject. What this transaction is does not admit of any doubt. The town was possessed of large interests, and so was the railroad,

and for good reasons known to each, and looking, as is manifest, from the city's viewpoint to aiding as far as possibly could be done in what would, they believed, be a great benefit to the town by bringing a railroad and securing its terminal there; and the railroad also owning valuable water front property recently theretofore acquired by it at a high figure, which the city desired, they agreed upon and entered into the contract in question, manifestly believing it to be for their mutual benefit, the city incidentally agreeing to exempt from town taxes the property it conveyed to the railroad, so long as the same was used for railroad purposes. The railroad was to build and maintain its tracks, depot, &c., and to construct and maintain certain large and valuable wharves for the city, enumerated in the contract. The bona fides of the transaction seemed not to have been questioned by any one, as is manifest from the fact that it was accepted by all, and allowed so to remain for more than a generation, and the desirability of what was done, taking into account the then status of the contracting parties, seems clear at even this late day.

+ Exemptions from and commutations of taxes are in no sense correlative terms. On the contrary, the words have a directly opposite meaning. The term "exemption" can not be applied with propriety to a release from taxes given for a valuable consideration. 37 Cyc. 381. In *Louisiana Cotton Co. v. New Orleans*, 31 La. Ann 447, the court said: "As used with reference to taxation and assessment, the term 'commute' means payment of a designated sum for the privilege of exemption, or the agreement of advancing a specific sum in lieu of an ad valorem tax." "Commutation contracts are those in which what is done, given or promised by one party, is considered as the equivalent to, or a consideration of what is done, given or promised by the other." La. Civil Code, 1900, art. 1768. "Commutation is the act of substituting one thing for another, a substitution of one sort of payment for another, or a smaller payment in lieu of a number of successive payments, usually at a reduced rate." *Woodruff v. Douglas County, Neb.* 98 N. W. 1092.

+ The supreme court of the United States in *Stearns v. Minnesota*, 179 U. S. 223, recognized the difference

between commuted taxation, and a naked exemption from the payment of taxes, and at page 237 the court after noting that commutation is not the same as exemption, or forbidden by constitutional provision which forbids exemption. quotes from the case of *County of Hennipen v. Railroad*, 33 Minn. 535, as follows: "This is not an immunity from taxation, but a commutation of taxes—another and substituted way prescribed by law in which the respondent as the owner of this land is to contribute its share to the public revenue;" and, also, *County of Ramsey vs. Railway Company*, 33 Minn. 542: "It was not in reality a plan for exemption property from taxation, but a substituted method of taxation. It must be supposed that this would fairly effect the object of taxation and be equivalent in its results to taxation of the property owned."

Cooley on Taxation, at page 110 says: "Where a certain sum is specified for a certain percentage upon valuation or upon receipts or acquisitions in any form, this is in the nature of a commutation of taxes, the state agreeing that the sum named is, under the circumstances, a fair equivalent for what the customary taxes would be, or the fair proportion which the person bargained with ought to pay, and the power thus to commute is undoubted. And this rule applies when a bonus is paid for complete future exemption, to the same extent and on the same reasons as when the commutation is for an annual payment."

And in the case of *Stearns v. Minnesota*, supra, 179 U. S. 240, the court further said: "So it may well be said in the case before us, that a contractual exemption of the property of a railroad company in whole upon consideration of a certain payment, cannot be changed by the state so as to continue the obligation in full, and at the same time deny to the company, either in whole or in part, the exemption conferred by the contract." And in the same case, at page 254, Justice Brown concurs in the opinion on the ground that this arrangement had been acquiesced in for thirty years, and was now too late to set up its repugnance to the State Constitution as against railways which were built upon the faith of its validity.

It can hardly be debatable that a city clothed with general corporate powers necessary to its maintenance

R. + and existence generally given in its charter, and necessarily and fairly implied therefrom, and essential to the declared objects of its franchise, could not enter into a contract to acquire property in its behalf, and to make all fair and reasonable contracts necessary to that end. This included the acquisition of property by lawful exchange, on making proper remuneration therefor, and if in addition to doing it, it took into account its right to levy and collect taxes, what it did, if fairly and honestly done, should and ought not to be construed as an exemption from taxes, but an acceptance of property in exchange as remuneration therefor.

In considering the validity of the contract, deed and ordinances of the city, every presumption favorable to their validity should be indulged; *Memphis v. Brown*, 20 Wall. 289; 22 L. Ed. 264; *Lincoln vs. Sun Vapor Co.*, 59 Fed. 756; *Meyers v. New York*, 69 N. Y. Supp. 529; *Reed vs. Anoka*, (Minn.) 88 N. W. 981; 28 Cyc. 675; and in cases like the present, where the element of consideration is concerned, a liberal, and not a strict construction should be placed upon the transaction. *New Jersey vs. Wilson*, 7 Cranch, 164; *New Jersey v. Yard*, 95 U. S. 104; *Wisconsin Co. vs. Powers*, 198 U. S. 379; *Choate vs. Trapp*, 224 U. S. 665; *Baltimore vs. B. & O. R. R. Co.* (Md.) 48 Am. Dec. 537.

Second. Purchase at judicial sale.

The city's contention that the exemption from city taxes did not pass to and enure to the benefit of the railroad, is clearly without merit. The terms of the mortgage under which the railroad purchased, were sufficiently broad to include what rights, privileges and immunities the property had belonging to it, under the contract and deed for the exchange of the properties, and the railroad, as well as its predecessor in title were purchasers for value thereof. In addition, the supplementary ordinances of 1865, 1867 and 1870 served to pass to the railroad the rights, privileges and exemptions, along with all other rights and interests acquired by its predecessor under the contract and deed of June 8, 1855, in and to the property conveyed.

But the position is untenable for another reason. What was done as to the release of taxes was by com-

mutation as above shown, and hence was a payment and not a relinquishment of the tax, and was the acquisition of property for valuable consideration, a contractual obligation binding on the city, and which enured to the railroad, and which the former can not escape from, or cast off at its will and pleasure, but which passed to the railroad as the purchaser of the property and its rights thereto and title therein are protected under the contract and due process clauses of the Federal constitution.

Cooley on Taxation, 3rd Ed. p. 108 says: "The pledge, in order to constitute a contract, must have the elements of contract, and the vital elements are upon consent and consideration. * * * There must be something received by the city for the relinquishment, or something surrendered on the other side which can be deemed a legal equivalent."

The same author, at p. 126, further says: "There is no room for any question, therefore, that when the State has stipulated by contract to give exemption from taxation, or has commuted an uncertain tax for a definite and fixed sum or sums, and afterwards undertakes to tax in the same manner as it taxes other subjects, persons, corporations, or property which was the subject of the exemption or commutation, the obligation of the contract is impaired."

In *Stearns v. Minnesota*, 179 U. S. 223, supra, the court recognized the difference between commutation of taxes and naked tax exemptions at p. 233-4 saying: "The federal court would for itself determine whether there had been any impairment of the contract, and whether the new company was entitled to the benefit of the commutation." And at p. 260, Mr. Justice White, in a concurring opinion, stated that "Considering for a moment the ratified agreement which the gross receipt tax law embodied, it is patent that the duties which had been imposed, and the obligation to which it gave rise, were in the strictest sense reciprocal or commuted; that is, the agreement to pay the gross receipt tax was predicated on the obligation on the part of the State to regard the payment of said tax as a discharge by the corporation of all taxes upon its real or personal property." *Wright v. Central of Ga. RR. Co.*, 236 U. S. 674. In *Central of Ga. RR. Co. v. Wright*, 248 U. S.

525, 527, involving the validity of a tax exemption, and whether the same passed to a successor in title to the railroad property, at page 527 Mr. Justice Holmes said: "The charter contracts in question are of a kind that go back to the time when railroads were barely beginning, and that would not likely to be repeated, but of course will be carried out by the State according to what was meant when they were made."

In *Phillips v. Portsmouth*, a comparatively recent decision, it is held that a "provision of a contract between the city and the water company, that the rental for water should be increased by the amount of any city tax on the company's property or works, necessary for the supply of water, was not an exemption of the property or works from city taxation, and hence the right to such increased rental passed to another company with which the contracting company subsequently merged or consolidated" (syllabus 3, *Phillips v. Portsmouth*, 115 Va. 180).

Third. The subject of laches.

That the city, the plaintiff in error herein, is estopped from making the defense now interposed in its behalf by reason of its previous conduct in respect to the transaction involved, and its laches and long acquiescence therein, seems too plain to admit of doubt. The contracts and undertakings were all entered into freely for a fair and full consideration, by parties competent to contract, with complete knowledge of all the circumstances and conditions surrounding the same, and which were lived up to and carried out in good faith, and within their true spirit and meaning from the year 1855 to the year 1894, a period of 39 years. In the latter year, and the year following, the right to claim the tax was first asserted, and promptly enjoined; and from the date of the junction and overruling of the city's demurrer to the bill on the 13th of July, 1897, now more than 28 years, the same has remained unchallenged, the city failing to press its claim to the two years taxes in question, or to assert its right thereto as to subsequent years.

A statute of limitation is one of repose. Courts of Equity by analogy follow the statutes as to many mat-

ters, but in defenses peculiar to that tribunal founded upon lapse of time and staleness of claims, they do not adhere strictly thereto. In such circumstances, courts of equity act upon their own inherent doctrine of discouraging for the peace of society, antiquated demands, by denying relief where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse claims. Story's Eq. Jour. 14th Ed. vol. 1, sec. 65, note 3 and cases cited; and vol. 3, sec. 1972, note 2 and cases cited.

Every consideration requires that transactions should be concluded and ended within a reasonable time; otherwise from the death of parties, the shortness of human life, the frailties of human memory, the loss and destruction of papers and documents and the constant change in human events, all sorts and kinds of injustice will likely follow, and complete justice rarely be reached. Nothing can more certainly disturb the peace of society, and likely work more serious and disastrous results than to keep open disputed transactions once concluded and brought to an end, and as to which the actors and participators can no longer speak. This case affords a striking illustration of the necessity for a reasonable adherence to these rules, because from the great length of time that has elapsed, there is danger of the grossest injustice being done.

While the limitation upon the time for the assertion of city taxes by suit is five years, (ch. 30, sec. 33, Code W. Va.) the effort is here made to uproot and annul a transaction closed 68 years ago, because it is alleged an illegal tax exemption entered into it. The actors in the transaction are all long since dead and gone, as well those actually participating therein, as those who acquiesced in and in good faith carried out the same for years and years after it was consummated. All of the conditions and surroundings tending to throw light on the reasons, purposes and motives of the contracting parties, have entirely changed. The city itself, then, was but a village, located in a lonely wilderness on the western frontier of Virginia, on the Ohio River; and the predecessor of the plaintiff railroad was a weak and struggling corporation, the hope and pride of Virginia and Maryland, looking to the building up and developing of those two great states, and the pro-

motion and extension of a feeling of amity and good will between the eastern and western sections of the country. During this long period, many and undreamed of events have taken place. The country itself has been involved in three mighty wars; the State in which the city was located has, as a result of one of those conflicts been cut in twain, and the city is no longer part of the state of which it formed a part, but of another and different state. Two generations of people have been born and lived. The section has developed beyond the anticipation of the most optimistic and hopeful, forming one of the highly developed and prosperous portions of the United States. Parkersburg is now a beautiful and prosperous city, and the Baltimore and Ohio Railway, the successor of the Northwestern Virginia Railroad, one of the strong and powerful railroad systems of the United States. The city, as a result of the wisdom and vision of those entering into the contract nearly three quarters of a century ago, and now sought to be frustrated and annulled, is located upon one of the world's highways of commerce, stretching east and west thousands of miles. Assuredly this ought not to be done unless there is the strongest consideration of law, justice and right requiring it. No private litigant would be heard to assert such a claim, and the city should not, either from a legal or moral standpoint, be allowed so to do. In this litigation, the city stands just as a private citizen; is clothed with no garb of sovereignty that excuses it from its long failure to assert its rights, or its laches and acquiescence in what has occurred in connection therewith.

Boone County v. Burlington RR. Co., 139 U. S. 684, was a suit in the United States District Court for the District of Nebraska, in which the County of Boone sought to impeach a decree of that court on the ground of fraud, and the court denied the relief, adopting the statute of the State of four years limitation as applicable to the transaction. On p. 693, the court said: "The appellant seeks to apply to the county and its officers in this case, the established rule that laches will not be imputed to a government for the failure on the part of its officers to perform their duty," citing authorities, * * * but this doctrine is not extended to such municipal corporations as the county of Boone."

Metropolitan RR. Co. v. District of Columbia, 132 U. S. 1, 11, 12. The principle of ratification by laches or delay is applicable to such a municipal corporation as it is to a private corporation or to an individual person," citing 1 Dillon on Municipal Corporations, 4th Ed. sec. 548 and cases cited. The statute of limitations in Nebraska makes no exceptions in favor of such a municipal corporation as the county of Boone, and the doctrine of laches applies to it and to its board of county commissioners. It may be said in this connection that in the State of West Virginia the statute of limitations runs even against the state.

In *Grymes v. Sanders* and others, 93 U. S. 55, 62, 63, a contract was sought to be rescinded on account of fraud and mistake; and the court at the last named pages reviewed the subject generally, with authorities quoted, holding that to entitle one to such relief, it must be sought promptly after the discovery of the alleged ground of action; that delay and laches are fatal, and a court of equity would never entertain such a request unless the parties could be placed in statu quo.

In *City of Savannah v. Kelly*, 108 U. S. 184, 191, the city sought by introducing the defense of ultra vires to avoid its liability for obligations theretofore issued by it. The court, speaking through Mr. Justice Matthews, said "The authorities of the city at that time were only anxious to omit nothing which the most careful might regard as important in securing for its obligations all the weight and value properly belonging to an unquestionable pledge of its faith and credit; and certainly now after the lapse of 20 years, in which no such question has been raised, it would, in the language of Mr. Justice Grier in *Mercer County v. Hackett*, 1 Wall. 83, 'be contrary to good faith and common justice to permit them to allege a newly discovered construction of an equivocal power'"; citing *Van Hook v. Madison City*, 1 Wall. 291; *Myer v. City of Muscatine*, 1 Wall. 384; *James vs. Milwaukee*, 16 Wall. 159.

In *Wright v. Railroad*, 246 U. S. 674, the supreme court at page 678 said: "To decide whether these taxes are such an unjustified exaction we must turn to the legislation of the State, bearing in mind that the practical construction given for nearly half a century is strong evidence that the plaintiff's conten-

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tion is right." *Central of Georgia RR. Co. v. Wright*, 248 U. S. 525, 527, *supra*.

In *Stearns v. Minnesota*, *supra*, 179 U. S. 223, the court speaking through Mr. Justice Brewer at page 233 said in regard to a contract for commutation of taxes "As a preliminary matter, it is worthy of notice that the alleged invalidity of the contract in respect to taxation, was not complained of for 30 years. Whether the revenues of the State were benefitted or injured by this method of taxation, we are not advised, but it does appear that neither party challenged it, both the railroad company and the state accepted and acted under it for nearly a third of a century."

In *Alpena Water Co. v. the City of Alpena*, 90 N. W. 323, the supreme court of Michigan, in construing the validity of a commutation of taxes, held, that the same having been acted upon by both parties for 20 years, that time was sufficient to conclude the controversy if ever the same was to be ended.

In *Luddington Water Co. v. Luddington*, the same court on page 78 of 90 N. W., held a similar contract valid, and commented on the fact of its having been acquiesced in by the parties for a period of 16 years.

On the subject of laches and stale demands, and the defense against the assertion of such claims, see 21 C. J. pp. 210, 211, 212, secs. 211a and 212b and notes.

Fourth. Effect of injunction and overruling the demurrer.

The effort of the city to escape the consequences of the court's action in granting the injunction and overruling the demurrer, leaving the injunction standing, is perhaps natural, having regard to the necessarily serious consequences their conduct respecting these matters should have in the light of the city's previous record of 39 years, in concurring in and carrying out the contracts and agreements sought to be vacated. Upon the assertion of the 1883 tax, as well as that of 1884, the collection of the same was promptly enjoined. Upon appropriate pleadings by demurrer and answer, exceptions to the answer by complainant, and motion to dissolve the injunction by the city, the case was heard and elaborately argued before Judge Goff, a native of West Virginia,

perhaps its most distinguished citizen, thoroughly enlightened as to its institutions, its public policy and laws; a noted judge of the country, and for some 20 years the Presiding Judge of this court, who, after full and mature consideration, on the 13th of July, 1897, overruled the demurrer, leaving the injunction in force. The city at this stage, asked leave to file its answer to the amended and supplemental bill, bringing in the second year's taxes, which was granted, and but for which the case, having been fully submitted upon the pleadings aforesaid, would then have been finally determined upon its merits. The answer was filed on the 11th of August following. From that date no further action was taken in the cause, save as follows: On the 11th of January, 1911, some 14 years later, by order, the city's attorney was permitted to withdraw the papers from the files of the court, with a view of inspecting them; and on the 17th of January, 1921, 10 years later, the cause, on ex parte application, was reinstated upon the docket, the same having been removed therefrom on the 9th of the previous January. No further action was taken to collect the two years taxes in question, nor has any step ever been taken to collect any other or further tax. What happened in respect to the demurrer, was quite as significant. While availing itself on the 11th of August, 1897, of the right to file its answer to the amended bill as granted, the court having adjudicated the legal questions against it by overruling the demurrer (*Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379, *Bowdoin College vs. Merritt*, 63 Fed. 213, 215; *Brown v. Fletcher*, 203 Fed. 70; 21 R. C. L. p. 529, which raised precisely the legal questions constituting the heart and substance of the ruling of the majority here, not a single move was ever thereafter taken in the cause for a period of 25 years, and even then the cause was brought up upon the ancient pleadings, save that on the 10th of January, 1923, some 29 years after the injunction was granted, the city moved anew to dissolve the same, which was, of course, denied.

Now, this entire course of the city had and could have had but one meaning, viz: that it abandoned its claim for taxes, and gave up its further defense to the suit. The failure to further prosecute the claim for the two years taxes in suit, and to levy or assess and assert a claim for future taxes had necessarily this effect;

and of course the failure to prosecute and offer proof of the facts set up in the answer for 14 years, and then to procure the papers from the record for inspection and keep them for more than 10 years, carries with it its own conclusive answer, and as a consequence, what should now be done. This conduct, save upon the theory of abandonment of the suit, would have been but trifling with the administration of justice concerning a large, grave and serious transaction, and would be true of any case, but particularly one involving an injunction, where action is most frequently taken upon a motion to dissolve. The suggestion of the city that the railroad perhaps was or should be held liable in part for the apparent failure to prosecute the suit, is not justified. Nothing could be further from the fact. The railroad had procured the injunction desired; and upon the decision of the sufficiency of the bill upon demurrer, and retention of the injunction, no further action was necessary to be taken by it, the city having asked for and procured leave to file an answer to the amended bill. For the railroad to have sought to speed the cause at this stage of the proceedings or to have prodded the city into making other and additional assessments of taxes against it, would have been alike unusual as a matter of equity practice, and exceedingly imprudent and foolish from a business viewpoint. "Good faith and the early assertion of rights are as essential on the part of a defendant in equity as they are on the part of a plaintiff". *Brown v. Lake Superior Iron Co.*, 134 U. S. 530. The propriety of granting an injunction, and the legal sufficiency thereof is generally rested upon motion to dissolve, and if the defendant wants to force action in this respect, the complainant presumably being content with the injunction where there is no limitation upon the running thereof, he makes such motion. The defendant, certainly after filing an answer, can always make this motion, though undue delay in so doing may prove a bar to such right. *Antisdel v. Chicago H. C. Co.*, 89 Fed. 308, 311; 22 Cyc. 985, notes 82, 83; *Clark v. Farrell*, 86 Hun. 156; *Rielly v. Frias*, 143 N. Y. State, 869, 159 N. Y. App. Div. 468; *Florence S. M. Co. v. Grover & Baker S. M. Co.*, 110 Mass. 1; *Kerr on Inj.* 565.

In this case, the city did make a motion to dissolve, which was in effect determined adversely to it, upon

the court's overruling the demurrer, and leaving the injunction intact; and the failure at that stage to take further action, and to delay renewing its motion to dissolve until January of the present year, some 29 years later, speaks volumes, as its acquiescence in what took place in connection with the injunction, especially in the light of its previously sleeping 39 years on its right, is what must estop it from making further clamor respecting the subject matter of the litigation. The city's long silence and acquiescence in the determination of the litigation against it, must be taken and treated as an estoppel against it and a waiver and abandonment of the right claimed. *Kerr on Fraud and Mistake*, p. 291, 299, 301; *National Mutual B. & L. Assn's v. Blair*, 98 Va. 495; *Despard v. Despard*, 53 W. Va. 443; *Norfolk & Western RR. Co. v. Purdy*, 40 W. Va.; *Hagerstown v. Hagerstown Co. (Md.)* 91 Atl. 41; *Grafton v. Patrick*, (S. C.) 122 Am. St. 586; *Bradford v. N. Y. Telephone Co. (Pa.)* 56 Atl. 41; *Edwards v. Cooper (Ind.)* 76 N. E. 1047; *Lux v. Haggins (Califf)* 10 Pac. 674; *Connell v. Clifford, (Colo.)* 88 Pac. 850.

Fifth. Liability of City to make restitution.

What is proposed to be done in this cause strikes at the very heart of the transaction, viz: that the long standing agreement between the parties shall be annulled; the railroad required to pay full taxes; and the city to have the benefit of the contract between them, and to keep and retain all of the property and estate and money received by it under the avoided contract.

That it is difficult for me to appreciate the correctness of the conclusion of the majority, and to join therein, becomes manifest, when from my viewpoint the contract between the parties to the litigation is a plain and apparently perfectly fair and just one, entered into upon full and fair consideration passing between them at the time; the railroad certainly conveying much valuable real estate to the city, and making extensive improvements and outlay for it on account thereof, and subsequently paying a large sum of money in connection therewith. The transaction is a large and important one, based upon what was supposed and believed to be a valid and binding contract, that has withstood the test of

years, and never until now in the 69th year of its age, has any infirmity in it ever been judicially ascertained. Its very age entitles this contract to much consideration in determining its validity, especially when the one seeking to disturb its repose is a party to the original transaction, fully possessed of all information it now has, and has loitered and slept on its rights during the intervening years, until now it is doubly estopped from making its false clamor.

Like all contracts, its binding force and effect should not be lightly brushed aside. The supreme court, speaking through Mr. Justice Swayne, has aptly impressed upon all the sacredness of contracts in the following language: "A compact lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as is possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellow man. They are the springs of business, trade, and commerce. Without them, society could not go on. Spotless faith in their fulfilment honors alike communities and individuals." (*Farrington v. Tennessee*, 95 U. S. 679, 682.)

The effort here is merely to avoid the contract, not because of any fraud, mistake, imposition or deceit entering into its inception, but because the city says it was ultra vires in so far as there was an exemption of city taxes given on certain property during its use by the railroad; and as a consequence it is asserted that the contract is wholly void, and the city can not be required even to make restitution of whatever it received, or to return the property conveyed to it. Assuredly this can not be true, even assuming there is any infirmity in the contract against which relief can or should now be afforded. The city is not exempt from the common obligation to do justice, and a legal liability springs from the moral duty to make restitution of that it should not have received, and to which it is not entitled, if the transaction is to be vacated. The city invokes the doctrine of ultra vires to prevent the enforcement of its own contract against itself. There is nothing suggested in the transaction involving moral turpitude; no intimation of any misconduct or default by the railroad company is

made, but merely that the city exceeded its authority in what it did.

In such cases, the law is entirely clear that a city can not repudiate as unauthorized, contracts under which it has received property, unless it surrenders the same.

In *Chapman v. County of Douglas*, 107 U. S. 348; involving a contract for the purchase of real estate, the court held it was ultra vires and void; but the city was required to make restitution of the property; the supreme court at p. 355 saying: "As the agreement between the parties has failed by reason of the legal disability of the county to perform its part according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title, would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *March vs. Fulton County*, 10 Wall. 676, and repeated in *Louisiana vs Wood*, 102 U. S. 294, 'the obligation to do justice rests upon all persons natural and artificial, and if a county obtains the money or property of others without authority, the law interdependent of any statute, will compel restitution or compensation.'"

In this same case, the supreme court further considering the right of a corporation to escape liability from its contracts by reason of its own ultra vires acts, at page 357 quotes approvingly from *Pimental v. City of San Francisco*, 21 Cal. 362, the following language: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligations rest upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtains other property which does not belong to her it is her duty to restore it, or if used to render an equivalent therefor, from the like obligation. *Argenti v. San Francisco*, 16 Cal 282. The legal liability springs from the moral duty to make restitution."

In *Stearns v. Minnesota*, 179 U. S. 223, supra, Mr. Justice White, at pages 261, 262, said: "My understanding does not permit me to doubt that to preserve in this case the contract in its entirety, so far as the rights of the state are concerned, and at the same time destroy the reciprocal duty owed by the state to the other contract-

ing party, is not to repeal, alter or amend the contract at all, but whilst preserving it to endeavor by an act of arbitrary power to impose a burden incompatible with the very provisions and terms of the amendatory act itself * * the agreements being thus interdependent are of necessity indivisible, and to retain the entire duty or right of one party to the contract, must lead to the preservation of the corresponding and reciprocal right or duty of the other."

In *Whitaker v. City of Huntington* (W. Va.) the court of last resort in that state strongly adheres to the views of the supreme court as stated. "Manifestly a corporation is as much bound by ordinary rules of honesty and by the terms of a valid contract, as any other contracting party. Even if it be conceded for the sake of argument, but not decided, that a city cannot be required to perform what it has promised to do, in the manner and to the extent promised, yet it seems clear on reason and principle that it cannot keep what it has lawfully obtained without restitution." (88 W. Va. 422.)

It may be generally stated that courts of equity are exceedingly averse to granting relief to those seeking rescission or cancellation of contracts, where it is difficult to restore the status quo, by returning whatever has been received under the contract, and where it is impossible so to do, or by so doing would defeat the ends of justice, or work a legal wrong, it is considered sufficient reason for refusing relief in equity. *Grymes v. Sanders*, 93 U. S. 55; *Railway Co. v. McCarthy*, 96 U. S. 258, 267; *Hitchcock v. Galveston*, 96 U. S. 341, 356-7; *Gay v. Alter*, 102 U. S. 79; *United States v. Norris*, 137 C. C. A. 552; *Morriston v. Singapore Co.* (Mass.) 39 N. E. 1113; *Snow v. Alley*, (Mass.) 144 Mass. 546; *Worthington v. Collins*, 39 W. Va. 406.

In my judgment, the decision of the lower court should be affirmed.

DECREE.

Filed and Entered December 17, 1923.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 2101.

The City of Parkersburg, a Municipal Corporation, Appellant,

vs.

The Baltimore & Ohio Railroad Company, a Corporation, Appellee.

Appeal from the District Court of the United States for the Northern District of West Virginia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of West Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Northern District of West Virginia, at Parkersburg, with directions to dismiss the bill in accordance with the opinion of this Court filed herein.

December 17, 1923.

C. A. WOODS,
U. S. Circuit Judge.

ORDER STAYING MANDATE.

Filed January 18, 1924.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 2101.

The City of Parkersburg, a Municipal Corporation, Appellant,

vs.

The Baltimore & Ohio Railroad Company, a Corporation, Appellee.

Appeal from the District Court of the United States for
the Northern District of West Virginia,
at Parkersburg.

Upon Application of Appellee, by its counsel, J. W. Vandervort, in which it sets forth its intention to appeal the above case to the Supreme Court of the United States, and also to apply to the Supreme Court of the United States for a writ of *certiorari* to this Court,It is Ordered that the mandate of this Court be, and the same is hereby, stayed pending Appellee's petition in the Supreme Court of the United States for a writ of *certiorari* to this Court, provided said appeal is taken, or said petition for *certiorari* is presented, in said Supreme Court within the time required by law.

January 18, 1924.

C. A. WOODS,
Senior Circuit Judge.

PETITION FOR APPEAL.

Filed February 13, 1924.

(Title omitted.)

To the Honorable Judges of the United States Circuit Court of Appeals, for the Fourth Circuit:

The Petition of The Baltimore and Ohio Railroad Company, a corporation of the State of Maryland, respectfully shows,—

That the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Fourth Circuit, and that a decree has therein been rendered on the 17th day of December, 1923, reversing the decree of the District Court of the United States for the Northern District of West Virginia; and that the matter in controversy in said suit exceeds the sum of one thousand dollars (\$1,000.00), exclusive of costs and interest; that this cause is one in which the United States Circuit Court of Appeals for the Fourth Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Your petitioner herewith files an assignment of errors to the decree complained of, and tenders any bond that your Honors may require.

Wherefore, the said Baltimore and Ohio Railroad Company prays that an appeal and supersedeas be allowed it in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to send the record and proceedings in the said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors filed by the said petitioner, may be reviewed, and if error be found, corrected according to the laws and customs of the United States; and petitioner prays that all proper process may be issued, and due proceedings had to perfect the appeal prayed for.

**THE BALTIMORE AND OHIO RAILROAD
COMPANY,**

By J. W. VANDERVORT, Of Counsel.

FRANK W. NESBITT,

MASON G. AMBLER,

J. W. VANDERVORT, Attorneys.

ASSIGNMENT OF ERRORS.

Filed February 13, 1924.

(Title omitted.)

The Baltimore and Ohio Railroad Company, in connection with its petition for an appeal herein, presents and files therewith its Assignment of Errors as to which matters and things it says that the decree entered herein on the 17th day of December, 1923, is erroneous, to-wit:

It was error—

1. To reverse and set aside the decree entered on the 7th day of February, 1923, in favor of the Baltimore and Ohio Railroad Company in and by the District Court of the United States for the Northern District of West Virginia.

2. To refuse to uphold and affirm the said decree entered by the District Court of the United States for the Northern District of West Virginia.

3. To dismiss the bill and amended bill of the petitioner, filed in the said District Court; and to deny to the petitioner all relief in the premises.

4. To hold and to decide to be void and not binding upon the City of Parkersburg, the following contracts, records and deeds; that is to say:

(a) The ordinance of June 8, 1855, authorizing the execution of a deed between the Town of Parkersburg and the North Western Virginia Railroad Company, shown at page 25 of Record,

(b) The deed of that same date, June 8, 1855 (Record, p. 27), between Parkersburg and the North Western Virginia Railroad Company, whereby in consideration of the grants, conveyances, covenants and stipulations, the sum of one dollar, the town grants the use of certain portions of the lands, banks, shores and other water rights, on certain conditions; and (Rec., p. 29) the town for like consideration grants and covenants with the Railroad Company that "all the property owned, used or occupied by the Company so long as same is used or appropriated by them to purposes connected with the business of the railroad, shall be free from all town taxes, assessments and charges. * * *" In consideration whereof, the Railroad Company grants and conveys to the Town valuable real estate set forth on page 29, and on page 30. The Company was required to construct a wharf along the Little Kanawha and Ohio Rivers, and three years thereafter construct a similar wharf for sixty feet on the Ohio River, to be owned by the City.

(c) The ordinance of April 10, 1865, by Section 3 thereof (p. 31) reference is made to former ordinances and to "the agreement between Parkersburg and the North Western Virginia Railroad Company, dated June 8, 1855, and all other ordinances and parts of ordinances heretofore passed and accepted, are hereby declared to be in full force and binding on the City of Parkersburg, and the Parkersburg Branch Railroad Company as the successors of the former parties thereto."

(d) The ordinance of May 10, 1867 (p. 32) which provided by Sec. 1, that the Parkersburg Branch Railroad Company—late North Western Virginia Railroad Company—are hereby authorized and empowered to construct and continue their railroad with single track, etc.

By Sec. 3, "the deed and agreement of June 8, 1855, and all other ordinances heretofore passed by Parkersburg and accepted by the North Western Virginia Railroad Co., are hereby declared in full force and binding on the City of Parkersburg and the Parkersburg Branch Railroad Company as successors respectively of the former parties thereto." (Record, p. 34.)

(e) The ordinance of March 15, 1870 (p. 37), authorizing the construction of bridge and approach across the Ohio River, and providing that the payment by the Parkersburg Branch Railroad Company to the City of seven thousand and five hundred dollars, shall be received in discharge of the requirement for building the wharf at the foot of Court Street on the Ohio River, as contained on the deed of 1855.

5. To hold and to decide that upon the foreclosure of the mortgage of the North Western Virginia Railroad Company in 1865, that no right to any commutation of taxes, and no right or equity to any consideration paid therefor, passed to the purchaser.

6. To hold and to decide that the decree of the United States Circuit Court (now District Court), in 1897, overruling the demurrers and leaving the injunctions in force, did not determine or settle the merits or principles of the cause, and did not sustain the validity of the deed and contracts.

7. To hold and to decide that the said City was not affected or estopped by its laches and conduct in recognizing and in performing the said deed and contracts from 1855 to 1894—a period of thirty-nine years, during all of which no claim to taxes had been asserted by the City, and to hold that the City was not affected or estopped by its subsequent acquiescence for twenty-five years additional in the decree entered on the 13th day of July, 1897, in the District Court by the Honorable Nathan Goff, Judge of the Circuit Court, then sitting, whereby the demurrers interposed by the City were overruled, to the bill and amended bill of the plaintiff and appellant.

8. To hold and decide to be null and void the contract of 1855 and the several ordinances made and passed by the City of Parkersburg in the years 1865, 1867 and 1870, confirming, ratifying and continuing in full force and binding upon the City and the Railroad Company, the covenants and provisions of the original ordinance and contract, and all other ordinances passed on that subject.

9. To hold and to decide that the action of the State and the City in assessing and levying taxes upon the property of the Railroad Company in 1893 and 1894, was not illegal and did not impair the obligation of the contract of 1855, and all subsequent ordinances and contracts in violation of Section 10 of Article 1 of the Constitution of the United States forbidding a State from passing any law impairing the obligation of contracts.

10. In failing to hold and to decide that the Commutation Contract contained in the agreement and deed of the 8th day of June, 1855, was valid and binding when entered into, and that the general assessment laws of West Virginia, under the authority of which the assessment and levy complained of was made, impaired the obligation of that contract in violation of the terms of Sec. 10, Article I of the Constitution of the United States.

11. In failing to hold that the action of the city in holding and remaining in possession of the property and consideration paid to it under the agreement and deed of June 8, 1855, and subsequent ordinances, and at the same time assessing and levying taxes upon appellant's property, was a taking of appellant's property, and deprived appellant thereof without due process of law, and was a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

12. To hold that the contracts in suit were *ultra vires* and did not involve any moral turpitude, and at the same time to deny and refuse to require the city to reconvey the lands or account for any moneys or property received by it for commutation of taxes under said contracts.

THE BALTIMORE AND OHIO RAILROAD
COMPANY,

By J. W. VANDERVORT, Of counsel.

FRANK W. NEXBITT,
MASON G. AMBLER,
J. W. VANDERVORT, Counsel.

ORDER ALLOWING APPEAL.

Filed February 13, 1924.

(Title omitted.)

The foregoing petition is granted and appeal allowed, as prayed for, upon The Baltimore & Ohio Railroad Company, a Corporation, giving bond, according to law, in the sum of \$1,000.

It is further ordered that the record to be transmitted in this case shall be the same as the record upon which this case was heard in the Circuit Court of Appeals for the Fourth Judicial Circuit, together with a transcript of all proceedings had and taken in the said case in the said Circuit Court of Appeals and subsequent thereto, including the opinions of the said Circuit Court of Appeals. The Clerk of the said Circuit Court of Appeals shall transmit to the Clerk of the Supreme Court of the United States a transcript of the record made up as above stated.

February 13, 1924.

C. A. WOODS,
Judge of the United States Circuit Court of
Appeals for the Fourth Circuit.

CITATION.

Issued February 13, 1924.

UNITED STATES OF AMERICA, ss:

The President of the United States,
To the City of Parkersburg, a Municipal Corporation,
Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to an appeal from a decree of the United States Circuit Court of Appeals for the Fourth Circuit, in your favor passed in a cause in said Court wherein The Baltimore & Ohio Railroad Company, a Corpora-

tion, is appellee, and you are appellant, to show cause, if any there be, why the decree rendered against the said Baltimore & Ohio Railroad Company, in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable C. A. Woods, Judge of the United States Circuit Court of Appeals for the Fourth Circuit, this 13th day of February, in the year of our Lord one thousand nine hundred and twenty-four.

C. A. WOODS,
Judge of the United States Circuit Court of
Appeals for the Fourth Circuit.

Legal service of above citation accepted.

February 15, 1924.

R. B. McDOUGLE,
F. P. MOATS,
Counsel for City of Parkersburg.

BOND.

Filed February 18, 1924.

Know all Men by these Presents, That we, The Baltimore & Ohio Railroad Company, a Corporation, as principal, and National Surety Company, a corporation, of New York, as surety, are held and firmly bound unto The City of Parkersburg, a Municipal Corporation, in the full and just sum of One Thousand (\$1,000) Dollars, to be paid to the said The City of Parkersburg, a Municipal Corporation, its certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 15th day of February in the year of our Lord one thousand nine hundred and twenty-four.

Whereas, lately at the November term of the United States Circuit Court of Appeals for the Fourth Circuit, in a suit depending in said Court between The City of Parkersburg, a Municipal Corporation, Appellant, and

The Baltimore & Ohio Railroad Company, a Corporation, Appellee, a decree was rendered against the said The Baltimore & Ohio Railroad Company, a Corporation, Appellee, and the said The Baltimore & Ohio Railroad Company, a Corporation, having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to The City of Parkersburg, a Municipal Corporation, citing and admonishing it to be and appear in the Supreme Court of the United States, at the City of Washington, District of Columbia, on the day in the said citation mentioned:

Now, the Condition of the above Obligation is Such, That if the said The Baltimore & Ohio Railroad Company, a Corporation, shall prosecute said appeal to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

THE BALTIMORE & OHIO R. R. CO.	
By J. W. VANDERVORT,	(Seal)
Atty. in fact.	
NATIONAL SURETY COMPANY,	(Seal)
By W. G. PETERKIN,	(Seal)
Res. Vice Pres.	

Attest:

HENRY A. SMITH, Res. Asst. Sec.

FRITZ GRIMM,
FRITZ GRIMM.

(Seal of Surety Co.)

Approved:

C. A. WOODS,
Judge of the United States Circuit Court of Appeals for the Fourth Circuit.

Endorsed: The foregoing bond was executed before me this 15th day of February, 1924, by the Baltimore & Ohio Railroad Company, by J. W. Vandervort, Atty-in-

fact, as Principal, and National Surety Company, as Surety in the Appeal of case 2101 of the B. & O. R. R. Co. against the City of Parkersburg, a municipal corporation, lately pending in the Circuit Court of Appeals for the 4th Circuit, at Richmond, Virginia.

(Seal)

FRITZ GRIMM,

Deputy Clerk of the Circuit Court of Wood Co.,
West Va.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 27th day of February, A. D., 1924.

(Seal of Court)

CLAUDE M. DEAN,
Clerk U. S. Circuit Court of
Appeals, Fourth Circuit.

Endorsed on cover: File No. 30,162. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 852. The Baltimore & Ohio Railroad Company, appellant, vs. The City of Parkersburg. Filed March 3, 1924. File No. 30,162.



POSTPONED TO MERITS

MAR 17 1924

IN THE

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1923.

No.  305

THE BALTIMORE AND OHIO RAILROAD COM-
PANY, a Corporation, *Petitioner*,

vs.

THE CITY OF PARKERSBURG, a Municipal Corpora-
tion, *Respondent*.

Motion and Petition for writ of certiorari directed to the
United States Circuit Court of Appeals
for the Fourth Circuit

Brief in support of Petition for certiorari.

JAMES W. VANDERVORT,
FRANK W. NESBIT,
MASON G. AMBLER,
Attorneys for Petitioner.

Office Supreme Court, U. S.

FILED

MAR 4 1924

WM. R. STANSBURY

CLERK

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1923.

THE BALTIMORE AND OHIO RAILROAD COM-
PANY, a Corporation, *Petitioner*,

vs.

THE CITY OF PARKERSBURG, a Municipal Corpora-
tion, *Respondent*.

Comes now The Baltimore and Ohio Railroad Com-
pany, by James W. Vandervort, its counsel, and moves
this Honorable Court, that it shall, by certiorari or other
proper process directed to the Honorable, the Judges of
the United States Circuit Court of Appeals for the
Fourth Circuit, require said Court to certify to this Court,
for its review an ddetermination a certain cause in said
Court of Appeals lately pending, wherein the Respond-
ent, The City of Parkersburg, a municipal corporation,
was Appellant, and your Petitioner, The Baltimore and
Ohio Railroad Company, a corporation, was Appellee
(Said case was numbered 2101) and to that end it now
tenders herewith its Petition and Brief with a certified
copy of the entire record in said cause in said Circuit
Court of Appeals.

J. W. Vandervort
Counsel

In The

SUPREME COURT
OF THE
UNITED STATES

No. OCTOBER TERM, 1923.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, a corporation, *Petitioner*,

VS.

THE CITY OF PARKERSBURG, a municipal
corporation, *Respondent*.

Petition for Writ of Certiorari Directed to the United States Circuit
Court of Appeals for the Fourth Circuit for Review and
Determination of Case No. 2101, May
Term, 1923, of that Court.

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The petition of the Baltimore & Ohio Railroad Com-
pany respectfully shows:

That it is aggrieved by a decree of the United States Circuit Court of Appeals for the Fourth Circuit, entered on the 17th day of December, 1923, reversing by a divided Court the decree of the District Court of the United States for the Northern District of West Virginia, and dismissing the Petitioner's bills.

Your petitioner filed its bills in 1894 and 1895 in the United States Circuit Court (now District Court) of West Virginia, and secured injunctions against the City of Parkersburg, and the Sheriff of Wood County, West Virginia, restraining them from enforcing the collection of municipal taxes for the years 1893 and 1894 by the seizure of certain locomotives belonging to petitioner. The City, by its action, was attempting to repudiate a certain ordinance and deed made in 1855, whereby taxes were commuted by the grant of valuable lands and rights to the City, and by further considerations later paid to the City under ratifying ordinances.

By Petitioner's bills, the following facts *inter alia* were set up:

In 1851 the North Western Virginia Railroad Company was chartered by the State of Virginia, and on March 21, 1853, executed mortgages to secure \$1,500,000 in bonds, which bonds were guaranteed by the Baltimore and Ohio Railroad Company. These mortgages also included all *after-acquired* property. In March, 1854, said Railroad Company purchased a large amount of real estate extending along the banks and shores of the Ohio and Little Kanawha Rivers; the town of Parkersburg, with wharf rights and other privileges. (Transcript, p. 21-22).

On June 8, 1855, the town, in order to induce the Railroad Company to make its terminal at Parkersburg, and

to secure for the town the Ohio River frontage and wharfage rights and privileges, passed an ordinance and entered into a deed with the Company, whereby the town obtained title in fee simple to all the Ohio River frontage from First Street to Sixth Street, (nearly half a mile) together with wharves and the right to collect wharfage charges, and other rights. The Railroad Company also covenanted to build at its expense for the City a wharf at First Street, and another at Third Street, and to make certain street improvements.

In consideration of all these matters, the town covenanted and agreed as follows: (Transcript pp. 29.)

“And the parties of the first part (Town) for the like consideration, do further grant and covenant to and with the parties of the second part, that all the property owned, used or occupied by the parties of the second part, within the jurisdiction of the parties of the first part so long as the same is used or appropriated by them to purposes connected with the business of the railroad, shall be free from all town taxes, assessments and charges, and that all the privileges hereby granted and assured by the parties of the first part shall apply as fully to the property and rights hereafter acquired, used, or occupied by them within the town and jurisdiction, as to those they now own, use, or occupy, and subject to the like conditions and limitations.”

In February, 1865, the mortgages of the North Western Virginia Railroad Company were foreclosed, and the Baltimore and Ohio Railroad Company, the guarantor of the bonds, became the purchaser of all of the property, franchises, rights, and privileges of the North Western Virginia Railroad Company, and in accordance

with the statute declared that it would continue the business under the name of The Parkersburg Branch Railroad Company. (Transcript, pp. 136.)

Shortly thereafter, in April, 1865, the City passed an ordinance, Section 3 thereof, expressly ratifying and confirming the deed and ordinance of June 8, 1855, "which are hereby declared to be in full force and binding upon the City of Parkersburg, and the Parkersburg Branch Railroad Company, as the successors respectively of the former parties thereto." (Transcript, pp. 31-32.)

By subsequent ordinances of 1867 and 1870, the same rights were recognized and confirmed, and reference expressly made to the deed and ordinance of 1855. Under the last ordinance, the Railroad Company was required to pay the sum of seven thousand and five hundred dollars in lieu of performing the covenant in the deed, which required the construction of the wharf at Third Street. (Transcript, pp. 34-38.)

Both parties observed and performed the covenants and agreements from 1855 until 1893, and no question was ever raised, and no taxes were claimed, assessed or levied until that year—a period of thirty-nine years. Then for the first time the property of the Railroad Company was assessed, and a levy made by seizure of certain locomotives belonging to The Baltimore and Ohio Railroad Company.

On April 10, 1894, petitioner filed its bill in the United States Circuit (now District) Court for the District of West Virginia, fully setting forth the above matters and exhibiting the various contracts, deed and ordinances, and secured an injunction from that court, restraining further proceedings against petitioner's prop-

erty for municipal taxes of 1893 amounting to \$1,043.73 (Transcript, pp. 41-42.) The City filed a demurrer to the bill, and later an answer. (Transcript, p. 44.)

On August 16, 1895, an amended and supplemental bill ~~amounting to \$1,736.05~~ was filed by petitioner to restrain the City from enforcing levy for taxes for 1894. *PA 1.786* The City filed a demurrer and moved to dissolve. (Transcript, pp. 142, 146.)

On October 2, 1895, the cause was submitted to the Honorable Nathan Goff upon the demurrers and motions to dissolve the injunctions. (Transcript, pp. 145, 146.)

Upon this hearing every question of merit, including the validity of the deed, ordinances, and contracts, was fully presented, as shown by the demurrers and by the printed briefs filed at that time and made a part of the record. (Transcript, pp. 155, 185)

Upon mature consideration, Judge Goff in 1897 overruled the demurrers and left the injunctions in full force, thereby sustaining the validity of the contracts. (Transcript, p. 146.)

Evidently regarding this decree as decisive of the case, the City made no further effort to dissolve the injunctions until February, 1923, over a quarter of a century later;—nor has the City attempted to collect any taxes during that period; so that, except in 1893 and 1894, it has for sixty-nine years recognized and kept its agreement, and has held and enjoyed the property granted and money paid to it therefor.

When the City in 1922 undertook to renew this litigation, petitioner moved to strike out the City's answer on account of laches, abandonment, and failure to do or

offer to do any equity, which motion was sustained by the Honorable W. E. Baker, Judge of the District Court in 1923, and the injunctions were perpetuated. (Transcript, p. 153.)

From this decree, the City took an appeal to the Circuit Court of Appeals for the Fourth Circuit.

The case was argued on May 23, 1923, and the decree of the District Court was reversed and Petitioners Bills dismissed on December 17, 1923, by a divided court,—the Hon. Charles A. Woods and the Hon. D. L. Groner reversing, and the Hon. Edmund Waddill dissenting. The dissenting opinion appears, (Transcript, p. 240-258.)

Thus three Judges—two of the Circuit Court of Appeals, Judges Goff and Waddill, and District Judge Baker—have sustained your petitioner's claims; and two Judges—Judge Woods of the Circuit Court of Appeals, and District Judge Groner—have denied them.

The majority opinion of the Circuit Court of Appeals holds that the deed, contracts and ordinances did not and could not commute taxation, and are invalid and ultra vires; that no right to such commutation or to any equity in the property conveyed therefor, or to any moneys received by the City, passed to your petitioner; that the ordinances of 1865, 1867, and 1870, (each of which reaffirmed the contract and commutation), made no reference to such rights, and did not validate them; that the conduct, acquiescence and laches of the City, either before or after suit, in no way affected its rights or estopped it from repudiating all such agreements and ordinances, or from keeping and enjoying the property and money paid thereunder; that the decision of Judge Goff in 1897, overruling the demurrers and motion to dissolve, did not

settle the principles of the cause, or involve the merits thereof; that the acquiescence of the City in that decision, and its abandonment of its claims for twenty-five years therein, were of no effect; that the deed and contracts while merely ultra vires and not involving any moral turpitude; yet conferred no right or equity upon your petitioner to any real estate, wharfage fees, or money paid to the City as consideration for commutation of taxes; but that the City had the right to repudiate the deed and contracts as invalid and to retain and enjoy all of said consideration without any accounting therefor.

Your petitioner is advised that the decree of the Circuit Court of Appeals is final and is erroneous, and that this Honorable Court should require the case to be certified to it for its review and determination under the Act of Congress permitting causes made final in the Circuit Court of Appeals to be certified for revision for the following reasons:

FIRST: Because of the great importance of the case.

The decision of the Circuit Court of Appeals cancels and annuls a deed and contracts made and carried out in good faith by both parties for nearly seventy years. The amounts involved are large. By this decree, petitioner is deprived of every benefit by way of commutation for municipal taxes throughout the future, and is rendered liable for back taxes. At the same time, petitioner is deprived of all rights in equity to the real estate conveyed, and the money paid, as consideration for such commutation of taxes, and the City is left in full possession and enjoyment of a vast river frontage, with wharfage and wharfage fees and privileges, and also \$7,500.00 paid by petitioner in 1870 in performance of the covenants of the

deed of 1855. Said decree makes a new contract that the parties never contemplated or agreed to, and which operates to deprive the petitioner of rights and properties vested and recognized upon valuable consideration, and to impair the contracts and ordinances of 1855, and subsequent years.

SECOND: Because the Circuit Court of Appeals has failed to follow or give force or effect to the rulings and decisions of this Honorable Court on the legal propositions involved.

(a) At the time the ordinance and deed of June, 1855, was made, and subsequent ordinances were passed, the customs of Virginia, and decisions of the highest courts of that State sustained the power of municipalities to grant naked exemptions from taxation, and such exemptions were held valid. There was no change in this line of decisions until 1892, when a bare majority of the Court undertook to overrule these prior decisions.

A contract valid at the time it was made, may not, in the Federal Courts, be affected by a change of State decisions made long after, where rights have fully vested.

Los Angeles vs. Los Angeles Water Co., 177 U. S. 558, 575; 44 L. Ed. 886. Burgess vs. Seligman, 107 U. S. 20, syl. 4. Great Southern Hotel vs. Jones, 193 U. S. 532, 543; 48 L. Ed. 778.

(b) This Honorable Court has made a clear distinction between exemptions from taxation, based on no consideration, and contracts commuting taxes for full and valuable consideration.

Stearns vs. Minnesota, 179 U. S. 223, 234, 237. New Jersey vs. Wilson, 7 Cranch 164, Wisconsin vs. Powers, 191 U. S. 379; 48 L. Ed. 229.

The right to such commutation has been held to pass to subsequent purchasers, and this is especially true where, as in the case at bar, the contract has been after ratified and confirmed by express and positive enactments, and further consideration has been paid therefor.

These elements of express contract, full consideration and positive subsequent confirmation, distinguish this case from that of *Rochester Railway Co. vs. Rochester*, 205 U. S. 236, and kindred cases where only a naked exemption or immunity was involved, and where, instead of subsequent recognition and ratification, the immunity was consistently contested and denied by the city.

(c) The doctrine of long continued practical construction has been applied to contracts of the character of those in suit; and periods of far less than seventy years have been held of strong and controlling importance and force. Thirty years—*Stearns vs. Minnesota*, 179 U. S. 223, 233 and 254. Fifty years—*Wright vs. Central of Georgia R. R. Co.*, 236 U. S. 674-678. *Mobile & Ohio R. R. Co. vs. Tennessee*, 153 U. S. 486, 501, 502, holding that contracts must be construed in the light of the times when made and by the acts of the parties thereunder.

(d) This Honorable Court has distinctly held that the doctrine of laches and estoppel apply to a municipal corporation, and that it may be barred by its conduct to deny its obligations. "The principle of ratification by laches or delay is as applicable to a municipal corporation as it is to a private corporation or to an individual." *Boone County vs. Burlington R. R. Co.*, 139 U. S. 684, 693; *Louisville vs. Telephone Co.*, 224 U. S. 649.

(e) This Honorable Court has held that where a contract was invalid merely because ultra vires and did not

involve any moral turpitude that there must be a restoration of the status quo; that the consideration must be returned and the equities settled; that a city cannot repudiate its contracts and at the same time keep the property and money paid therefor.

Chapman vs. County of Douglas, 107 U. S. 348, 355. "The obligation to do justice, rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law independent of any statute will compel restoration or restitution." Hitchcock vs. Galveston, 96 U. S. 341. These cases are cited and approved in Ward vs. Love County, 253 U. S. 752.

The Court below cited Thomas vs. Railroad Co., 101 U. S. 71, and like cases, which involved the violation of penal statutes; active wrong doing; whereas, in the case at bar, the contracts when made were not interdicted by constitution or statute, but were approved by decisions of the highest courts.

THIRD: Because the decree and opinion of the Circuit Court of Appeals is based in part upon a misapprehension of the rulings of this Honorab'le Court.

This is especially true of the holding of the Circuit Court of Appeals, that there is no distinction between a contract of naked exemption and a contract commuting taxes, where valuable consideration is paid, and that even where such contract of commutation has been positively recognized and continued by both parties after foreclosure, no rights passed to the purchaser either as to the commutation or the property and money paid therefor.

The case of Rochester Railway Co. vs. Rochester, 205 U. S. 236, is not applicable here, either upon the facts or the law. It is highly inequitable to cancel the agreements

made by the parties, and to forfeit the consideration paid thereunder to the City.

FOURTH: Because there is a difference of Judicial opinion in this cause, and the weight of that opinion is in favor of Petitioner.

This case was submitted upon demurrers which raised all questions of merit, in 1895, before Honorable Nathan Goff, who for twenty years was presiding Judge of the Circuit Court of Appeals for the Fourth Circuit. He was a native of West Virginia, and fully versed in the history, laws and decisions of Virginia and West Virginia, and sustained the validity of the deed and contracts.

In 1923, District Judge Baker of West Virginia, upon full argument of this cause, affirmed the holdings of Judge Goff in favor of your Petitioner.

Upon appeal to the Circuit Court of Appeals, Judge Waddill of that Court, in a lengthy dissenting opinion, fully sustained the decision of Judges Goff and Baker. Thus two appellate judges and one District judge, have upheld Petitioner's claims in their entirety, and one Appellate judge and one District judge have denied them.

In view of these extremely diverse decisions and opinions on a question of great importance to Petitioner, and to the public, and with the weight of that opinion favoring petitioner, it is respectfully submitted that this Honorable Court should decide these issues.

Petitioner exhibits as a part of this application, a certified copy of the entire transcript of the record of the case, including the decree of reversal, and the opinion of the Circuit Court of Appeals and the dissenting opinion

of the Hon. Edmund Waddill, and all proceedings in said Court, to which the writ of certiorari is asked to be directed.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of the court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding the court to certify and send to this Court on a date to be designated, a full and complete transcript of the record in the proceedings of the Circuit Court of Appeals in the said case therein, entitled—"The City of Parkersburg, a municipal corporation, Appellant, versus The Baltimore and Ohio Railroad Company, a corporation, Appellee, No. 2101," to the end that said case may be reviewed and determined by this court as provided by law; that your petitioner may have such other, further relief or remedy in the premises as to this court may seem appropriate; and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

And your petitioner will ever pray.

THE BALTIMORE & OHIO RAILROAD COMPANY,

By

JAMES W. VANDERVORT,

FRANK W. NESBITT,

MASON G. AMBLER,

Attorneys for Petitioner.

W. Vandervort
of counsel,

STATE OF WEST VIRGINIA,
COUNTY OF WOOD,

ss:

Before me, the subscriber, a Notary Public in and for
the State and County aforesaid, this day personally ap-

peared J. W. Paulson
who, being by me first duly sworn, says, that he is one
of the counsel for The Baltimore and Ohio Railroad Com-
pany, petitioner; that he prepared the foregoing petition,
and that the allegations thereof are true as he verily
believes.

J. W. Paulson
Sworn to and subscribed before me, this 12th day
of February, 1924.

Fannie I. Radenbaugh
Notary Public.

My commission expires the 28th day of Sept., 1930.

IN THE
SUPREME COURT OF THE
UNITED STATES

No. -----

OCTOBER TERM, 1923.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, a corporation, *Petitioner*,

vs.

THE CITY OF PARKERSBURG, a municipal
corporation, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR
CERTIORARI.

The principles involved in this case are of far reaching importance. For the material facts involved, we refer to the petition for certiorari.

The demurrers filed by the City in 1895 went to the heart of the case and raised every question of merit. The majority opinion of the Circuit Court of Appeals is based upon these demurrers, and states, that the answers of the City raised the same questions.

The Bills of Petitioner set out in full all the contracts and proceedings; alleged that full and valuable consideration had been paid for the commutation of taxes; that the arrangement was fair, and the Railroad Company had been induced to bring its property within the City upon the faith of the City's promise and representations; that the deed of 1855 had been repeatedly recognized and confirmed, that there had been long practical construction thereof by both parties, and that it was a fraud upon the company, for the City under all these circumstances to repudiate the agreements, and to tax the very property which the Company had been induced to place within the City upon the faith of the City's promise not to tax, particularly when the City still kept and enjoyed all the consideration paid therefor. The demurrers admitted, of course, the matters of fact and all fair inferences to be drawn therefrom.

It is not contended, that such contracts could be validly made today in view of changed constitutional and statutory provisions; but that they were valid at the time they were made, and should be construed in the light of that period.

In *Mobile & Ohio R. R. Co. vs Tennessee*, 153 U. S. 486, at page 502, it is said: "Legislative contracts especially should be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail. In *Platt*

v. Union Pacific R. R. Co., 99 U. S. 48, Mr. Justice Strong expresses this proposition as follows: 'There is always a tendency to construe Statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. But endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed; look at things as they appeared to it, and discover its purpose from the language used in connection with attending circumstances.'

So in *Central Georgia R. R. Co. vs. Wright*, 248 U. S. 527: "The charter contracts (of exemption) in question, are of a kind that go back to the time when railroads were barely beginning, and would not likely to be repeated; but of course they will be carried out by the State according to what was meant when they were made."

Baltimore vs. Baltimore & Ohio Railroad Co., 6 Gill 288; 48 Am. Dec. 537.

At the time the contract and deed of June 8, 1855, were made, the power of municipalities to grant naked exemptions (without consideration) was sustained, and the policy was especially liberal as to railroads, then a prime need, particularly in the wilderness section of Western Virginia.

In *Danville vs. Shelton*, 76 Virginia, 325, 334, municipalities were expressly held to have this power; and, again, in *City of Petersburg vs. Petersburg*, 78 Va. 331, 335. These cases cite earlier decisions of the same import, and establish the extremely liberal policy pursued by the State of Virginia in these matters.

It was not until 1892 that the Virginia Court in *Whiting vs. West Point*, 88 Va. 905, by a divided Court (two

Judges dissenting) undertook to question these former decisions on naked exemption. At that time West Virginia was no longer a part of Virginia, and the decision was not binding upon her. It was, however, the inspiration for the action of the City of Parkersburg a year later in 1893, in undertaking for the first time to repudiate the deed of 1855 and subsequent agreements.

The majority opinion in the case at bar makes no reference to the early decisions, but relies upon cases decided long after the deed and contracts were made and acted upon.

2. FEDERAL COURTS WILL FOLLOW THE STATE DECISIONS, UPON THE FAITH OF WHICH CONTRACTS HAVE BEEN MADE AND RIGHTS HAVE BECOME VESTED.

As a practical matter, a change of judicial decisions, the effect of which is to render invalid a contract valid according to the decisions as they stood at the time it was entered into, involves as great a hardship as the express enactment of a constitutional provision or a retrospective statute changing the previous law on the subject.

If a case originates in a Federal Court as here, that court is not bound to follow later decisions of a State Court which overthrow contracts valid at the time they were entered into. This Honorable Court has in many cases where there has been a change of view by the State Court, followed the first decision of that Court, especially where the action involved contract rights valid when made.

In *Burgess vs. Seligman*, 107 U. S. 20, syl. 4, "When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions of the State tribunals, or when there has been no decision, the courts of the United States assert the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be given by the State courts after such rights have accrued."

In *Los Angeles vs. Los Angeles Water Co.*, 177 U. S. 558, at page 576, the Court says, "We are not concerned, however, to reconcile the cases decided since 1870. The cases prior to that time made the obligation of the contract of 1868 and determined the power of the legislature to ratify it. There seems to have been no question of this power. Besides legislative recognition, besides recognition by many acts of the City, the contract has received judicial recognition."

Great Southern Hotel Co. vs. Jones, 193 U. S. 532.

Ohio Life Insurance Co. vs. DeBolt, 16 Howard 416.

Gelpecke vs. Dubuque 1 Wall 175.

II. THE AGREEMENT AND DEED OF 1855 WAS A COMMUTATION OF TAXES, NOT A BARE EXEMPTION.

This court has made a very clear distinction between mere naked exemptions from taxation where nothing was paid, and contracts based on full consideration under which taxes were commuted or paid.

In *Stearns vs. Minnesota*, 179 U. S. 223, at page 237, the Court, after noting that commutation is not the same as exemption, or forbidden by a constitutional provision against exemption, says: "This is not an immunity from taxation, but a substituted method of taxation. It must be supposed that this would fairly effect the object of taxation, and be equivalent in its results to taxation of property owned."

So, in *Wisconsin R. R. Co. vs. Powers*, 191 U. S. 379 (decided upon demurrer) the court emphasized the absence of any consideration or of an express contract "the presence or absence of consideration is an aid to construction, a circumstance to take into account in determining whether the state has purported to bind itself irrevocably, or has merely used words of encouragement or bounty; but not amounting to a covenant. "The building of the railroad and the exemption are not set against each other in the terms of a bargain."

Also—*New Jersey vs. Wilson*, 7 Cranch 164.

Cooley on Taxation, 3d Edition, p. 110, says: "Where a certain sum is specified for a certain percentage upon valuation or upon receipts or acquisitions in any form, this is in the nature of a commutation of taxes, the state agreeing that the sum named is, under the circumstances, a fair equivalent for what the customary taxes would be, or the fair proportion which the person bargained with ought to pay, and the power thus to commute is undoubted. And this rule applies when a bonus is paid for complete future exemption, to the same extent and on the same reasons as when the commutation is for an annual payment."

- In *Louisiana Cotton Co. vs. New Orleans*, 31 La. Annotated 447.

“As used with reference to taxation and assessment, the term ‘commute’ means a payment of a designated sum for the privilege of exemption, or the agreement in advance of a specific sum in lieu of an ad valorem tax.”

“Commutation contracts, are those in which what is done, given or promised by one party is construed as equivalent to, or a consideration for what is done, given or promised by the other.

La Civil Code 1900, article 1768.

“Commutation is the act of substituting one thing for another, a substitution of one sort of payment for another, or of a single payment in lieu of a number of successive payments, usually at a reduced rate.”

Woodrough vs. Douglass County, Nebraska, 98 N. W. 1092.

In Cooley on Taxation (3rd Ed.) p. 108, it is said: “The pledge, in order to constitute a contract, must have the elements of a contract, and the vital elements are consent and consideration. * * * There must be something received by the State for the relinquishment, or something surrendered on the other side which can be deemed a legal equivalent.”

“In the case first referred to (N. J. vs. Wilson, 7 Cranch. 164) the consideration was manifest; the state was bargaining away lands, and was presenting the exemption from taxation as an inducement for better terms on the other side. So if the legislature by law, in order to secure the establishment of a charitable institution, charter a corporation, and in the charter declare that its property shall be exempt from taxation, and individuals in reliance thereon invest their means to secure the accomplishment of the object of the law, a consideration for

the state's promise is thus made out. *The case is still plainer if the state receives a bonus or other valuable consideration for the grant stipulating in the grant to give exemption from taxation, or if it made the grant to a corporation on the surrender by it of valuable rights."*

In the case at Bar, there was a deed under seal, and the Bill alleges that the railroad company by this contract was induced to locate its terminal at Parkersburg instead of going two miles below the city. The consideration received by the City from the Company was:

1. The location of its terminal at Parkersburg, and large expenditures within the City.
2. The grant in fee simple of all the Ohio River frontage extending from First to Sixth Streets, about one-half a mile, in the business district.
3. The construction of a wharf at First Street.
4. The payment of \$7,500.00 later (1870) in lieu of another wharf at Third Street.
5. The right to charge and collect wharfage fees. This last was of large importance. It appears in *Transportation Co. vs. Parkersburg*, 107 U. S., p. 694, that in the year 1876 alone over \$2,700.00 was collected by the City for wharfage fees, an amount many times in excess of any possible taxes on the railroad company.

In view of these large considerations, and the long continued enjoyment thereof by the city to its entire satisfaction for nearly forty years, before any complaint, it is clear that cases like *Whiting vs. West Point*, involving bare exemptions, have no application; nor is the strict and drastic construction given this agreement by the Circuit Court of Appeals, warranted.

Strict rules of construction will not be applied to a commutation contract.

New Jersey vs. Wilson, 7 Cranch. 164.

New Jersey vs. Yard, 95 U. S. 104.

Traverse County vs. St. Paul (Minn.) 76 N. W. 217.

Baltimore vs. B. & O. R. R. Co. (Md.) 48 Am. Dec. 537; 37 Cyc. 894.

The invariable rule of the Courts in considering questions of validity in municipal contracts is to indulge every presumption in their favor.

Memphis vs. Brown, 20 Wall. 289; 22 L. Ed. 264.

Lincoln vs. Sun Vapor Co., 59 Fed. 756 (8 C. C. A. 253.)

Reed vs. Anoka (Minn.) 88 N. W. 981; 28 Cyc. 675.

There is no claim by the City of any imposition, fraud or injustice on the part of the Railroad Company. The Bills allege that full and fair consideration was paid, and that the only fraud was on the part of the City in repudiating its agreement and retaining the consideration.

III. THE RIGHTS UNDER THE CONTRACT AND DEED OF 1855 PASSED TO THE PURCHASING COMPANY.

The majority of opinion holds, that upon the foreclosure of the North Western Virginia Railroad Company's mortgage in 1865, no right either to the commutation or to any property paid therefore, passed to the purchaser. This, on the authority of cases involving only naked exemptions. The effect of this holding is that if one million dollars' worth of property has been conveyed to the City out of the mortgage assets of the North Western

Virginia Railroad Co. as commutation for taxes on railroad property, and a foreclosure occurred within one year thereafter, the purchaser could take no right or benefit under that contract. The City would hold all the property free of any claim or equity. No case involving a commutation has been found that so holds. On the contrary, in *Sterns vs. Minnesota*, 179 U. S. at page 234, the right was held to pass on a sale. *New Jersey vs. Wilson*, 7 Cranch 164.

In *Phillips vs. Portsmouth*, 115 Va. 180, Syl. 3, all benefits of a commutation agreement between a city and a water company were held to pass to another company.

And where, under different constitutional provisions, a contract of commutation was held invalid and ultra vires, the right to the consideration paid therefor, passed to several successive purchasers.

Richmond vs. Va. Railway & Power Co. (Va.)
98 S. E. 681-694.

In addition to the fact that full consideration was paid, there are other matters of vital import here. (1) It is not questioned that the mortgages covered after-acquired property. The property conveyed to the City was taken from the mortgage assets that would otherwise have gone to the purchaser on foreclosure. (2) The City expressly confirmed and continued all of the provisions of the deed of 1855 after the sale, by the ordinances of 1865, '67 and '70 and accepted additional monies. It is true the majority opinion by exceptionally drastic construction, says that the commutation was not included, because not in terms expressly mentioned; that the railroad company, by section 3 of these ordinances, obtained only "the right to use steam on its trains."

The language of section three in the ordinance of 1865 and of 1867, expressly confirms the deed of 1855. It refers to an ordinance of 1852, and says:

“Which, together with the deed of conveyance and agreement between the said President, Recorder and Trustees, and the said Northwestern Virginia Railroad Company, bearing date on the 8th day of June, in the year one thousand eight hundred and fifty-five, and of record in the County of Wood, and State of West Virginia, and all other ordinances and parts of ordinances heretofore passed by the said town, and accepted by the Northwestern Virginia Railroad Company, and not repealed, are hereby declared to be in full force and binding on the City of Parkersburg, and the said Parkersburg Branch Railroad Company as the *successors*, respectively of the former parties thereto.” (Transcript pg. 31-34.)

It would be hard to conceive language more comprehensive in all respects than was used in these ordinances. Everything of whatever nature or description comprised in the deed of June, 1855, and former ordinances, was continued in “FULL FORCE.” This does not mean *partly in force*, or omitting the main provisions of the deed of 1855.

If there could be any doubt as to what the parties intended, the subsequent action of the city in never assessing or claiming any taxes, would make the construction clear.

At the time these ordinances were passed, there was great rivalry among communities on the Ohio River to secure trunk lines west. The litigation over the Wheeling & Pittsburgh Bridges, demonstrates this. Parkersburg recognized the great benefits to accrue to the city by trade with the West.

She offered inducements to the Railroad Company to bridge the Ohio at that important period, and she positively recognized and affirmed the deed of 1855 as in full force and binding upon her. Ten years later she not only enjoyed the benefits of trunk line facilities to the West, but also revenues of over \$2,700 a year from wharfage rights, which she obtained under the deed of 1855.

As heretofore noted, the authorities call for a liberal construction of Commutation Contracts. All that is asked here is for a fair and reasonable construction of the language of these agreements and the acts of the parties during a long period.

A strict and extreme construction is not justified by the facts or the law. Cases like that of Rochester Railway Co. vs. Rochester, 205 U. S. 236 cited by the majority opinion, we submit do not apply. That case involved an exemption from special assessments for paving. There was nothing in the nature of a commutation. There was no subsequent ratification or recognition by the city of the exemption, but it was denied and contested. The other cases cited are to be distinguished on the same grounds.

No case has been found where under a commutation contract, it is held that neither the right to the commutation nor the right to the consideration paid therefor, passed to a purchaser or assignee. On the contrary, many cases hold that a naked exemption is such a right or privilege as will pass to another Company.

Humphrey vs. Peques, 16 Wall. 244.

Chesapeake & Ohio R. R. Co. vs. Virginia, 94 U. S. 718.

Tennessee vs. Whitworth, 117 U. S. 139, 146.

Wright vs. Georgia Central R. R. Co., 236 U. S.
674.

Columbia Water Power Co. vs. Campbell (S. C.)
54 S. E. 833.

IV. THE DOCTRINE OF PRACTICAL CONSTRUCTION APPLIES WHERE THE PARTIES HAVE ACTED UNDER CONTRACTS FOR SEVENTY YEARS.

It is clear that from 1855 until 1894, a period of thirty nine years, the deed was recognized not only by three ordinances, but by continuous performance by all parties, without question or complaint.

It is also shown that there was complete acquiescence in the decision of Judge Goff overruling the demurrers to the bills in 1897, and that the City made no further effort to dissolve the Injunctions until 1923—twenty-six years later; so that except for a brief period in 1894-95 the deed and ordinances have been fully observed for seventy years.

In the case of Stearns vs. Minnesota, 179 U. S., p. 233, the Court says, at page 233, in regard to a contract for commutation of taxes, "As a preliminary matter it is worthy of note that the alleged invalidity of this contract in respect to taxation was not complained of for thirty years. It appears that neither party challenged it. Both the railroad company and the state accepted and acted under it for nearly a third of a century.

Justice Brown, in this case, at page 254, based his opinion on the fact that the contract had been recognized as valid for thirty years, and it was therefore too late to set up its repugnance to the State Constitution as against railways which were built upon the faith of its validity.

In *Wright vs. Central R. R. Co.*, 236 U. S. 674, the Court says, at page 678: "To decide whether these taxes were such an unjustified exaction, we must turn to the legislation of the State, bearing in mind that the practical construction given for nearly half a century is strong evidence that the Railroad Company's contention is right."

And so in *Central Ga. Railroad Co. vs. Wright*, 248 U. S. p. 527, the Court says, "the charter contracts in question (exemption) are of a kind that go back to the time when railroads were barely beginning, and would not be likely to be repeated; but, of course, they will be carried out by the State according to what was meant when they were made."

See, also, *Mobile & Ohio Railroad Co. vs. Tennessee*, 153 U. S., pp. 486, 501, 502. Contracts must be construed in the light of the time when made.

In *Bank vs. Parker*, 192 U. S. 78, contemporaneous construction for fifty-eight years of a bank's charter, was held to preclude a claim for license taxes. See page 81.

The same principle is recognized in *Potter vs. Hall*, 189 U. S. 292.

Southern Pacific R. R. Co. vs. Bell, 183 U. S. 675.

Hewitt vs. Schultz, 180 U. S. 139.

U. S. vs. Pugh, 99 U. S. 265-269.

V. LACHES AND ESTOPPEL APPLY TO THE CITY.

The cases cited on estoppel in the majority opinion, generally concern transactions entered into contrary to the express provisions of statutes. For example: *Thomas*

vs. City of Richmond, 12 Wallace 349, involved the issuance of bills by the City of Richmond against the provisions of a penal statute. There is nothing of this character in the case at bar. The contracts were sanctioned by the decisions of the highest courts, as shown, and these very contracts were held valid by Judge Goff in 1897, and that decision was acquiesced in by the City for over a quarter of a century.

“This is a suit in equity. In such a suit the claims of the Government appeal to the conscience of the Chancellor with no greater or less force than those of a private individual under similar circumstances.”

Hemmer vs. United States, 204 Fed. 898; 123 C. C. A. 194.

United States vs. Stinson, 197 U. S. 200, 204, 205; 49 L. Ed. 724.

Iowa vs. Carr, 191 Fed. 257; 112 C. C. A. 477.

The doctrine of laches has been expressly applied by this Honorable Court to municipal corporations.

In the case of Boone vs. Burlington Co., 139 U. S. 684, a delay of five years in a case involving fraud, was held to bar the county from relief. The court says, at page 693, “The appellant seeks to apply to the county, and its officers, in this case, the established rule that laches will not be imputed to a Government for a failure on the part of its officers to perform their duty; but this doctrine is not extended to such a municipal corporation as the County of Boone. Metropolitan Railroad Company vs. District of Columbia, 132 U. S. 1. The principle of ratification by laches or delay is as applicable to such a municipal corporation as it is to a private corporation or to an individual person.”

In West Virginia, by section 2 of chapter 35, West Virginia Code, "Every statute of limitations, unless otherwise expressly provided, shall apply to the state." This has been the law since 1882, and was sustained and applied in *State vs. Miller*, 84 W. Va. 176.

By Section 33, chap. 30, W. Va. Code, the limitation against suits for taxes is five years.

The cases on practical construction have already been cited, and embrace features of laches and estoppel, even as against the state. The case at bar involves a long-period and more acts of estoppel than any cited.

In *Savannah vs. Kelley*, 108 U. S. 184, 191, the city sought by introducing the defense of *ultra vires* to avoid its liability for obligations theretofore incurred by it. The Court, speaking through Mr. Justice Matthews, said "The authorities of the city at that time were only anxious to omit nothing which the most careful might regard as important in securing for its obligations all the weight and value properly belonging to an unquestionable pledge of its faith and credit; and certainly now after the lapse of 20 years, in which no such question has been raised, it would, in the language of Mr. Justice Grier in *Mercer County v. Hackett*, 1 Wall. 83, be contrary to good faith and common justice to permit them to allege a newly discovered construction of an equivocal power"; citing *Van Hostrup v. Madison City*, 1 Wall. 291; *Meyer v. City of Muscatine*, 1 Wall. 384; *James vs. Milwaukee*, 16 Wall. 159.

In *Grymes v. Sanders and others*, 93 U. S. 55, 62, 63, a contract was sought to be rescinded on account of fraud and mistake; and the court at the last named pages reviewed the subject generally, with authorities quoted,

holding that to entitle one to such relief, it must be sought promptly after the discovery of the alleged ground of action; that delay and laches are fatal, and a court of equity would never entertain such a request unless the parties could be placed in statu quo.

In *Alpena Water Co. vs. The City of Alpena*, 90 N. W. 323, the supreme court of Michigan, in construing the validity of a commutation of taxes, held, that the same having been acted upon by both parties for 20 years, that time was sufficient to conclude the controversy if ever the same was to be ended.

In *Luddington Water Co. vs. Luddington*, the same court, on page 78 of 90 N. W., held a similar contract valid, and commented on the fact of its having been acquiesced in by the parties for a period of sixteen years.

VI. THE DECISION UPON DEMURRER AND MOTION TO DISOLVE WENT TO THE MERITS OF THIS CASE.

The grounds stated in the demurrers raised every question of merit, and were directed to the validity of the several contracts.

The briefs filed in 1895 in support of the demurrers exhaustively argued the same propositions considered and decided by the Circuit Court of Appeals.

The dissenting opinion says, "the demurrer raised precisely the legal questions constituting the heart and substance on the ruling of the majority here."

The majority opinion says, "under the bills and demurrers the validity of the attempted tax exemption was elaborately argued before Hon. Nathan Goff, Circuit

Judge. * * * * * Thereafter, on August 11th, 1897, the City filed its answer to the amended and supplemental bill reiterating the defenses set up in the answer to the original bill, and again alleging the invalidity of the ordinances and contracts of the City Council."

Thus it appears that the demurrers at bar went to the merits of the case; that the answers raised identically the same questions but the majority opinion gives no effect to the further fact that the City then abandoned the case and made no further effort to dissolve the injunctions or take any other action, until twenty-five years later. when it moved to dismiss.

In *Wisconsin Co. vs. Powers*, 191 U. S. 379,—a demurrer was sustained to a bill which put in issue the validity of tax exemption, and this was held to be a final adjudication.

In *Bowdoin College vs. Merritt*, 63 Fed. 213, it was held, that a decision on demurrer is the law of the case on motion to dismiss.

In *Brown vs. Fletcher*, 203 Fed. 70, "Defenses pleaded in an answer, which were in substance determined adversely to the defendant, on demurrer, will not be again considered."

In *Fish vs. McGann* (111.) 68 N. E. 761—"When a demurrer is interposed to a pleading, which the court overrules, and the defendant elected to abide by the demurrer, the judgment thereupon was conclusive of the facts confessed by the demurrer. The facts alleged in the pleading are in such case admitted of record by the judgment upon demurrer."

Alley vs. Nott 111 U. S. 475.

In 21 Ruling Case Law, p. 529, "On demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue of fact, joined on the same pleading; and found in favor of the same party. It is a judicial determination of the legal sufficiency of the facts pleaded, and is as conclusive of the facts confessed by the demurrer, as a verdict finding them would be."

If there were any doubt as to the effect of the decision upon the demurrer, the long acquiescence of the City in that decision, and its abandonment of the cause should be held to conclude it.

"Good faith and early assertion of rights, are as essential on the part of the defendant in equity as they are on the part of the plaintiff."

Brown vs. Lake Superior Iron Co., 134 U. S. 530.

VII.. IF THE CONTRACTS IN SUIT WERE ULTRA VIRES, THE CITY SHOULD BE REQUIRED TO MAKE RESTITUTION.

The majority opinion cancels four agreements—the ordinance and deed of 1855, the ordinances of 1865, 1867 and 1870—so far as they in any wise concern the commutation of taxes.

It is not claimed in the majority opinion that these contracts were prohibited by law, but that the City simply lacked the power to make them. At the same time the Railroad Company is treated as an active wrongdoer. It is penalized and made to forfeit property and money; while the City is given the right to tax the property of the Railroad Company and to recover back tax-

es. It is submitted that the facts do not justify such extreme and stringent rulings, and that cases like *Thomas vs. Railroad Company*, 101 U. S. 71, which involved the violation of a positive penal statute, are not applicable to the case at bar. Furthermore, the Circuit Court of Appeals in passing upon the demurrers did not have proof of the values involved before it. The bills alleged that full value had been paid for the commutation, and the deed exhibited shows very valuable lands and rights conveyed to the City. If the deed between the North Western Virginia Railroad Company and Parkersburg was invalid because *ultra vires*, there certainly were equities there to be adjusted. Surely in a Court of Equity there could not be a forfeiture of great values in land and income therefrom to pay a comparatively small amount in taxes. The income from wharfage fees alone probably amounted to much in excess of the taxes. The city nowhere claims that receipts did not fully offset taxes.

The purchaser at the foreclosure sale of the North Western Virginia Railroad Company, was entitled to the equity belonging to that Company concerning this property; and these rights, were carried over and recognized and affirmed by the subsequent ordinances and acts of the parties.

The dissenting opinion well says, "What is proposed to be done in this cause, strikes at the very heart of the transaction, viz: that the long standing agreement between the parties shall be annulled; the railroad company required to pay full taxes, and the City to have the benefit of the contract between them and to keep and retain all of the property and estate and money received by it under the avoided contract."

And this is held, even though the income from that property was vastly in excess of all taxes throughout the entire period. There is nothing suggested in the transactions involving moral turpitude; no suggestion of any misconduct or default by the Railroad Company; but merely that the City exceeded its authority in what it did.

In such cases, this Honorable Court has repeatedly decided that a city cannot repudiate as unauthorized, contracts under which it has received property, unless it surrenders the same.

In *Chapman v. County of Douglas*, 107 U. S. 348; involving a contract for the purchase of real estate, the court held it was *ultra vires* and void; but the city was required to make restitution of the property; the supreme court at p. 355 saying: "As the agreement between the parties has failed by reason of the legal disability of the county to perform its part according to its conditions the right of the vendor to rescind the contract and to a restitution of his title, would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *March vs. Fulton County*, 10 Wall. 676, and repeated in *Louisiana vs. Wood*, 102 U. S. 294, 'the obligation to do justice rests upon all persons natural and artificial, and if a county obtains the money or property of others without authority, the law independent of any statute, will compel restitution or compensation.' "

In this same case, the supreme Court further considering the right of a corporation to escape liability from its contracts by reason of its own *ultra vires* acts, at page 357 quotes approvingly from *Pimental v. City of San Francisco*, 21 Cal. 362, the following language: "The

city is not exempted from the common obligation to do justice which binds individuals. Such obligations rest upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtains other property which does not belong to her it is her duty to restore it, or if used to render an equivalent therefor, from the like obligation. *Argenti v. San Francisco*, 16 Cal. 282. The legal liability springs from the moral duty to make restitution."

In *Hitchcock vs. Galveston*, 96 U. S. 341, substantially the same language is used. "It matters not if the promise was to pay in a manner not authorized by law. If payment cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment should not be made at all."

In *Pullman Car Co. vs. Transportation Co.*, 171 U. S. 138, the Court held, the contract in that case was entirely illegal and void, and contrary to positive law. The court required an accounting on the ground of "the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, which in justice he ought to recover." In *Stearns vs. Minnesota*, 179 U. S. 223, at pages 261-262, Mr. Justice White concurring, expresses similar views.

In *Louisville Water Co. vs. Clark* 143 U. S. 1, 15, & 16 the city was required to pay for water when a tax exemption was destroyed.

In *Ortega Co. vs. Triary, Receiver*, 260 U. S. 103, the Court held, that a covenant for a five cent fare was

the principal consideration for a contract; but that the Public Service Commission had power to increase the fare to seven cents. The court, however, in concluding, says "While this denies the relief, the Ortega Co. prays, We do not wish to be understood as adjudging that the Company may not be entitled to some remedy for the non-observance of the contract by the Traction Company. See *Louisville & N. R. R. Co. vs. Crow*, 156 Ky. 27; 49 L. R. A. (N. S.) 848."

In that Kentucky case, the plaintiff was allowed to recover the value of land received by a Railroad Company under an invalid agreement for passes.

In *Ward vs. Love County*, 253 U. S. 752, this court has approved the principles announced in *Chapman vs. County of Douglas*, 107 U. S. 348, and similar cases.

In *Whitaker vs. City of Huntington*, 88 W. Va. 422, the Supreme Court of West Virginia strongly approves the views of this court, and says "manifestly the corporation is as much bound by ordinary rules of honesty, and by the terms of a valid contract, as any other contracting party. Even if it be conceded for the sake of argument, but not decided, that a city cannot be required to perform what it has promised to do in the manner and to the extent promised; yet it seems clear on reason and principle that it cannot keep what it has lawfully obtained, without restitution."

Relief in equity has frequently been denied to those seeking rescission or cancellation of contracts, where it is difficult to restore the status quo, or where it is impossible to do so, and where to award relief would "defeat the ends of justice or work a legal wrong."

Railway Co. vs. McCarthy, 96 U. S. 258.
Grymes vs. Sanders, 93 U. S. 55.
Gay vs. Alter, 102 U. S. 79.
Snow vs. Alley, 144 Mass. 546.
Worthington vs. Collins, 39 W. Va. 406.
Washington Seminary vs. Washington. 18 Pa.
Superior 555.
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**VIII. THERE IS AN UNUSUAL AND EXTREME
DIFFERENCE OF JUDICIAL OPINION IN THIS CASE.**

We respectfully refer to the dissenting opinion of the Honorable Edmund Waddill of the Circuit Court of Appeals, as a clear statement of the principles relied upon by petitioner. This opinion also expresses the views of Judge Nathan Goff, long presiding judge of the Circuit Court of Appeals, and Judge William E. Baker of the District Court of West Virginia, both of whom upheld the validity of these contracts. These judges were natives of West Virginia, fully versed in the laws and institutions of this state and of Virginia, and gave this case most thorough consideration. Three Judges have sustained your petitioner's rights, while two have denied them. The denial involves matters of such vast importance, both in property values and in future taxes, that petitioner submits that there should be a consideration and an adjudication of these issues by this Honorable Court.

Respectfully Submitted,

JAMES W. VANDERVORT,
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MASON G. AMBLER,
Attorneys for Petitioner

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IN THE
**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1924

No. 305

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Appellant and Petitioner,
VS.

THE CITY OF PARKERSBURG,
Appellee and Respondent.

ON APPEAL FROM, AND PETITION FOR WRIT OF,
CERTIORARI TO, THE UNITED STATES
CIRCUIT COURT OF APPEALS, FOR
THE FOURTH CIRCUIT

BRIEF ON BEHALF OF THE BALTIMORE AND OHIO
RAILROAD COMPANY, APPELLANT
AND PETITIONER.

FRANK W. NESBITT,
JAMES W. VANDERVORT,
MASON G. AMBLER,
Attorneys for Appellant and Petitioner.



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IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1924.

No. 305

THE BALTIMORE & OHIO RAILROAD COMPANY,
a Corporation, *Petitioner and Appellant*,

vs.

THE CITY OF PARKERSBURG, A MUNICIPAL
CORPORATION, *Respondent and Appellee*.

Brief on Behalf of The Baltimore & Ohio Railroad Com-
pany, Petitioner and Appellant,

On Petition for a Writ of Certiorari to and Appeal from
The United States Circuit Court of Appeals
For the Fourth Circuit.

STATEMENT

This is an appeal from a decree of the United States Circuit Court of Appeals for the Fourth Circuit, entered on the 17th day of December, 1923, reversing, by a divided court, the decree of the District Court of the United States, for the Northern District of West Virginia, and dismissing Appellant's bills.

The opinion of the Circuit Court of Appeals is reported in 296 Federal, p. 74, and also appears, Record, page 160; Dissenting Opinion, Record, p. 174.

An appeal was granted from the decree of the Circuit Court of Appeals on February 13, 1924, (Record, p. 200), and bond was given (R., p. 201).

A petition for a writ of certiorari was also filed on behalf of the Baltimore & Ohio Railroad Company, and both proceedings are to be heard together.

Appellant filed its bills in 1894 and 1895 in the United States Circuit Court (now District Court) of West Virginia, and secured injunctions against the City of Parkersburg and the Sheriff of Wood County, West Virginia, restraining them from enforcing the collection of municipal taxes for the years 1893 and 1894, by the seizure of certain locomotives belonging to appellant. The City, by its action, was attempting to repudiate, and treat as null and void, a certain ordinance and deed made in 1855, whereby municipal taxes were commuted by the grant of valuable lands, wharfage rights and other privileges to the City, and by further considerations later paid to the City by the Railroad Company under ratifying ordinances.

The facts appearing on the record may be grouped under three divisions:

1. The deed and ordinance of June 8, 1855, whereby municipal taxes were commuted.

2. The ratifying ordinances of 1865, 1867 and 1870, under which the ordinances and deed of 1855 were confirmed and continued in full force.

3. The litigation in the District Court from 1894 to 1923.

1.

THE ORDINANCE AND DEED OF JUNE 8, 1855

The Town of Parkersburg was incorporated by Act of the Virginia Assembly, January 22, 1920. Acts of Assembly, 1920.

The 2nd Section of that Act provides that "the President, Recorder, and Trustees elected, and their successors in office, shall be and are hereby made a body politic and corporate by the name of President, Recorder and Trustees of the Town of Parkersburg, and by the name aforesaid, shall have capacity to purchase, receive, possess and convey any real estate for the use of said town," etc.

The third Section of that Act provides among other things that the President, Recorder and Trustees of the Town shall have certain powers, among these powers: "They shall have power to pass such by-laws and ordinances for the regulation and improvement of the streets and public landings, etc., and for such other purposes as they may deem necessary for the internal safety and convenience of said town and the inhabitants thereof, provided such by-laws and ordinances are not contrary to the laws and Constitution of the State of Virginia or of the United States."

At that time, and long afterwards, towns and cities in Virginia were in the nature of Free cities, and possessed legislative power and full control over their inhabitants. There were no constitutional or statutory prohibitions in regard to the taxing power or against exemptions.

The State of Virginia and its cities and towns for a long period granted naked exemptions from taxation; that is, exemptions without any feature of commutation or

consideration other than the construction of enterprises such as railroads and other works of internal improvement.

The right and power of municipal corporations to grant naked exemptions, was adjudged valid and lawful by the Supreme Court of Virginia, in decisions extending to *Danville vs. Shelton*, 76 Virginia 325, which in express terms affirmed that power in municipalities.

This was never questioned until in 1892 a divided court in *Whiting vs. West Point*, 88 Va. 905, held, that Virginia municipalities did not have the power to grant naked exemptions.

On February 14, 1851, the Virginia Assembly passed an act to incorporate the Northwestern Virginia Railroad Company.

This company was organized shortly after, and proceeded to construct its road from Grafton to Parkersburg, as an auxiliary or branch of the Baltimore & Ohio Railroad Company, which had then already completed its railroad from Baltimore to Grafton.

On March 21, 1853, the Northwestern Company, in order to acquire the necessary means to construct its railroad, and acting under the authority given by its charter, executed a deed of trust or mortgage to the Mayor and City of Baltimore, on all of its then present and future property, in order to secure bonds amounting to the sum of \$1,500,000.00; and on the same day it executed to the Baltimore & Ohio Railroad Company, and subject to the First Mortgage, a Second Mortgage to secure one million dollars of the bonds of the Northwestern Virginia Railroad Company, which were guaranteed by the Baltimore & Ohio Railroad Company. Copies of these mortgages appear as exhibits with the bill. (R. 9-14).

By these mortgages the property and works of every kind and description of the Company, were included and conveyed in trust for the purposes of the said mortgages. The mortgages also included *after-acquired* property in accordance with the express terms of the Statute of Virginia then in force, Sections 27 and 28 of Chapter 61 of the Code of Virginia of 1849.

About one year after the execution of said mortgages, John J. Jackson and others, on March 13, 1854, conveyed by deed of general warranty to the Northwestern Virginia Railroad Company, certain real estate located along and upon the banks and shores of the Ohio and Little Kanawha Rivers, in the town of Parkersburg, together with wharfage rights and other privileges of large value. A copy of this deed is filed with the bill as "Exhibit C". (R. 15.)

The town had been expressly authorized by Act of the Virginia Assembly in 1848 to purchase the Ohio River frontage for wharves, etc.

In 1855, the Northwestern Virginia Railroad Company had not been constructed to Parkersburg, and the company intended to establish its terminal on the Ohio River at a point some miles below the town. The town was extremely anxious to insure that the Railroad Company would establish its terminal and works within the town limits, and it also desired to acquire the Ohio River frontage. Accordingly, on the 8th day of June, 1855, an ordinance was unanimously adopted by the Council to effect these objects. (Rec. p. 18 to 20.)

The provisions of this ordinance were, on the same date carried into a deed, "Exhibit E". (R. 20 to 22.)

Under this deed, the town granted to the Railroad Company the free use of the land along the Kanawha

River with the right to use the streets and alleys, which intersected this narrow strip. The Railroad Company already had title to this land by the deed above mentioned; and the only benefit conferred by the town was the right to cross the streets and alleys. The deed from the town then confirms a franchise already granted to the Railroad Company on October 25th, 1852; but imposes on the Company the duty of grading and keeping in repair the streets and alleys on which its tracks were to be laid, and of constructing and maintaining a culvert across Kanawha Street on a line of Juliana Street, to take care of the water from Rifle Run.

Then follows the main consideration to the Company:

“And the parties of the first part (Town) for the like consideration, do further grant and covenant to and with the parties of the second part, that all the property owned, used or occupied by the parties of the second part, within the jurisdiction of the parties of the first part *so long as the same is used or appropriated by them to purposes connected with the business of the railroad*, shall be free from all town taxes, assessments and charges, and that all the privileges hereby granted and assured by the parties of the first part shall apply as fully to the property and rights *hereafter acquired*, used, or occupied by them within the said town and jurisdiction, as to those they now own, use, or occupy, and subject to the like conditions and limitations.”

The next provisions in the deed concern the grants and covenants made by the Railroad Company to the town. In consideration of this commutation, the Railroad Company granted and conveyed to the town:—

1. All the Ohio River frontage from First Street to Sixth Street. This valuable frontage extends nearly one-half a mile along the Ohio River for six city blocks and

contains four acres. It was and is the only space of that character open to the City and is in the commercial district.

2. All water rights and appurtenances thereunto belonging, to be used exclusively for wharves, landings and other purposes connected with the use of the Ohio and Little Kanawha Rivers.

3. The right to the town to charge wharfage on all steamboats and other craft navigating the said rivers, and landing or lying at, or in front of any part of the said town, excepting boats or craft owned and chartered by the Railroad Company, running in connection with the railroad.

4. The Railroad Company further agreed to construct and pave or macadamize, at its own expense, a wharf of suitable grade, and complete it by the time the railroad was open, extending from the easterly side of Ann Street along the Little Kanawha and Ohio Rivers to an extension of the upper line of Kanawha Street.

5. The Railroad Company also agreed to build within three years another wharf at the foot of Third Street sixty feet wide, said wharves when completed to become the property of the town and its successors.

It will be seen that the town paid for all of these valuable lands wharfage rights and charges and new wharf construction, mainly by commuting taxes on the Railroad Company's property, "so long as the same is used or appropriated to purposes connected with the Railroad."

By this deed of 1855, the City induced the Railroad Company to locate its lines and property within the City limits. (Bill, Record, p. 3; Amended Bill, p. 92.) And it also received property rights of very great value, which

were not only equivalent to, but far in excess of any taxes then or thereafter accruing.

The railroad was not completed to the town until 1857, but when in operation, it proved of the greatest benefit to the municipality. Instead of communication with the eastern seaboard requiring ten days to two weeks, under the most favorable conditions, the time was cut to a matter of hours, with the service open all the year around. The Company however only enjoyed four years of operation until in 1861 when the war came on. West Virginia was formed and admitted into the Union June 20, 1863. One of the chief benefits of the Union through the admission of the new state, was the operation by the Federal Government, of the Baltimore and Ohio Railroad Company and of the North-Western Virginia Railroad Company to the Ohio River. The War, however, caused such losses that the North Western Virginia Railroad Company became insolvent. In February, 1865, the deeds of trust and mortgages of March, 1853, were foreclosed. At the sale the Baltimore and Ohio Railroad Company, which was not only a guarantor of the bonds of the North Western Company, but also a creditor otherwise, became the purchaser.

By Section 28 of Chapter 61, of the Virginia Code of 1860, it was provided, "that if a sale be made under a deed of trust or mortgage executed by a company on all of its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company as they were at the time of the making of the said deed of trust or mortgage, but any works which the company may, after that time, and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale other than debts due to it. Upon such conveyance to the purchaser, the said company

shall ipso facto be dissolved, and the said purchaser shall forthwith be a corporation by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded in the Court in which the conveyance shall be recorded."

Section 29. "The corporation created by or in consequence of said sale and conveyance, shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been had or should have been performed by the first company, but for such sale and conveyance."

The Baltimore and Ohio Railroad Company being the purchaser, declared in accordance with this statute that it would continue the business under the name of the Parkersburg Branch Railroad Company, as appears in the deed of conveyance to it. (Rec., p. 43-45).

2.

THE ORDINANCES OF THE CITY OF PARKERSBURG PASSED IN 1865, 1867, AND 1870, AFFIRMED AND CONTINUED THE ORDINANCE AND DEED OF JUNE 8, 1855, IN FULL FORCE AND BINDING UPON THE CITY AND THE RAILROAD COMPANY. BOTH PARTIES CONTINUED PERFORMANCE OF ALL THE PROVISIONS.

As a matter of history in 1865 a new era in railroad construction began. There was great rivalry among cities along the Ohio River to secure bridges and railroad connections with the West. The City of Parkersburg was as anxious then for a trunk line to the West as it had been ten years before for a line to the East. The City was under no obligation to promote such a work, unless it so desired, and the Railroad Company was not obliged to locate a bridge within the limits of the city. It might have

gone below the town, where it had originally intended to locate its terminal until induced by the City to come within its limits.

The ordinance contracts from 1865 to 1870 in regard to this matter show that each was a proposition made by the City to the Parkersburg Branch Railroad Company as the recognized successor of the North-Western Virginia Railroad Company, and each ordinance expressly referred to the agreement and deed of June 8, 1855, and affirmed all of the provisions as in full force and binding upon both parties.

The ordinance dated May 30, 1865, appears Record pp. 46-47.

Section 1 of that Ordinance begins as follows:

"That the Parkersburg Branch Railroad Company, late the Northwestern Virginia Railroad Company, are hereby authorized and empowered, etc."

By Section 3 of said ordinance, it is provided, that the franchise of October 25th, 1852, "together with the deed of conveyance and agreement between said President, Recorder and Trustees and the said Northwestern Virginia Railroad Company, bearing date on the 8th day of June, 1855, and of record in the County of Wood and State of West Virginia, and all other ordinances and parts of ordinances heretofore passed by the said Town, and accepted by the Northwestern Virginia Railroad Company and not repealed, are hereby declared to be in full force and binding on the City of Parkersburg, and the said Parkersburg Branch Railroad Company as the successors, respectively, of the former parties thereto."

Section 4 of that ordinance obligated the company to construct the wharf at Third Street, as provided in the deed of June 8, 1855, and this was the only covenant in that deed, which had not been fully performed by the Northwestern Company.

In 1867, it was found necessary to make some changes in the plan, and to widen Washington Street to meet the wishes of the City.

An Ordinance, dated May 10, 1867, was accordingly passed (Record, p. 23) in which the same terms are used declaring the agreement and deed of June 8, 1855, and all ordinances or parts of ordinances to be in full force and binding upon the City of Parkersburg and the Parkersburg Branch Railroad Company as the successors respectively of the parties thereto. Provision is then made for the widening of Washington Street twenty feet, the Railroad Company to pay all expenses except \$15,000.00 which the City agreed to pay, and the title to all land so acquired, to be held by the City. The City had the power to condemn; therefore, it undertook the work. The Railroad Company paid all but \$15,000.00 for the purchase of the property acquired, and the city received full title to the lands.

By further ordinance of March 15, 1870, (Rec., p. 27), the City accepted \$7,500.00 from the Railroad Company in lieu of the construction of the wharf at Third Street, and the City, by Section 3 of that ordinance, also secured the right to construct a wharf on the Little Kanawha lands owned by the Railroad Company.

Thus under these several ordinances the City in every possible way, recognized and affirmed the ordinance and deed of June 8, 1855, as in full force and binding upon it, and upon the Parkersburg Branch Railroad Company, and required the Parkersburg Branch Company as the successor of the Northwestern Virginia Railroad Company to perform the covenants contained in that deed, and the Parkersburg Branch Company did perform to the satisfaction of the City.

From June, 1855, until 1894, a period of thirty-nine years, these various contracts were performed, and no taxes were levied or demanded by the City. It treated the tax covenant as in *full force*, and no one ever questioned it. This fact clearly shows the meaning and intention of these agreements, and that they were construed alike by both parties during all of this period. Notwithstanding these facts, the majority opinion of the Circuit Court of Appeals holds (Record, p. 173), by a severely drastic construction, that the covenant commuting taxes contained in the deed of 1855 did not, nor did any equity thereto, pass to the Railroad Company under these several ordinances.

It is further said in the opinion, that "This is made all the more evident by the fact that Section 3 of the Ordinance of May 30, 1865, and the same ordinance of May 10, 1867, declaring in full force the ordinance of June 8, 1855, and the deed executed at the same time, relate exclusively to permission to the Railroad Company to use steam on their trains and make no mention of tax exemption." (Rec. p. 173.)

It is also suggested that the City received little of value under these ordinances, whereas the Railroad Company received great benefits. The record shows no complaint by any one during all this period as to these transactions, and the City does not claim that it had not received full value. There is no charge of fraud, unfairness or overreaching in any of these matters.

Whether judged in the light of those times, or later, it is evident that the City did receive large benefits under these ordinances.

1. It can hardly be questioned that the bridge over

the Ohio River, with trunk line connections west, was a consideration of vast value to the City of Parkersburg.

2. In addition to increased commerce, it also meant a large investment and great expenditures for labor and material. The City became the site of one of the greatest bridges of that time.

3. The City also acquired title to twenty feet along the entire length of Washington Street, for which the Railroad Company largely paid.

4. In addition to these considerations, the bridge was assessed as a separate structure, and the City has received in municipal taxes, from that property, thousands of dollars every year. Thus a new and valuable source of revenue to the city was derived wholly from the construction of this bridge.

5. Furthermore, the title of the City to the Ohio River frontage, was confirmed by these ordinances, and any question as to whether the title to this after-acquired property passed to the City in 1855 free from the lien of the mortgages of 1853, was thereby settled. In addition, the City also received seventy-five hundred dollars under the ordinance of 1870, and also the right to a wharf on the Kanawha lands of the Company.

In 1875, by statute, the assessment of railroads was vested in the Board of Public Works and the Auditor of the State but it was provided "the property exempt from taxation by the Charter of such Company or otherwise shall not be assessed" Sec. 67, Chap. 54, Acts of W. Va. Legislature, 1875.

In 1881, by Section 67, chapter 12, Acts of West Virginia Legislature of that year, it was provided:

“No such railroad as is mentioned in this section shall be exempt from taxation, whether the same has been, or may be, created or organized or operated by, under or by virtue of any general or special law or laws, or whether heretofore exempted from taxation or not; but this section shall apply to all railroad companies and corporations without distinction or exception.”

This Act is now found in Sec. 107, of Chap. 29 of the Code of West Virginia.

This subsequent statute could not affect or impair the obligation of the contracts between the Railroad Company and the City; and no attempt was made to so apply it until after the decision of the Virginia Court in 1892, in *Whiting vs. West Point*, 88 Virginia 905, above referred to.

3.

THE LITIGATION.

After performing the covenants of the deed and ordinances for nearly forty years, without objection from any source, the City in 1893 caused the property of the railroad company then for the first time to be assessed by the State and made a levy by the seizure of certain locomotives belonging to the Baltimore and Ohio Railroad Company.

On April 10, 1893, appellant filed its bill in the United States Circuit (now District) Court for the District of West Virginia, fully setting forth the above matters and exhibiting the various contracts, deed and ordinances, and secured an injunction from that court, restraining further proceedings against petitioner's property for municipal taxes of 1893 amounting to \$1,043.73.

The City filed a demurrer to the bill, and later an answer (Record, pp. 31-32). By its answer the city

claimed that the deed and ordinances were void because *ultra vires*, but charged that even if valid when made that the Railroad Company knew that the commutation was to be enjoyed at the pleasure of the Legislature of the State of West Virginia, and the City Council of Parkersburg; that by Statute of February, 1877, and amendatory acts the state had placed the assessment of railroads in the Board of Public Works (Rec. 36); that by subsequent statute *exemptions* (not commutations) from taxation had been prohibited (38) and by reason of these *laws* the City was relieved from further obligation under her contracts.

The City further denied the right to any accounting on account of property, rents and profits received from land and money derived from the railroad company, but claimed that the right to tax the railroad was of the value to the city of \$20,000.00; meaning the interest on that amount of money would equal the annual tax of \$1,000 (R. 42). This is the only measure of value furnished by the city on any of the matters involved in suit. There is no disclosure of any values it had received in property, revenues from wharfage or otherwise.

On August 16, 1895, an amended and supplemental bill was filed by petitioner to restrain the City from enforcing a levy for taxes for 1894 (R. 91). The City filed a demurrer and moved to dissolve (R. 102-3).

On October 2, 1895, the cause was submitted to the Honorable Nathan Goff upon the demurrers answer and motions to dissolve the injunctions. (Record, pp. 103-4.)

Upon this hearing every question of merit, including the validity of the deed, ordinances, and contracts and the effect of all subsequent Statutes was fully presented, as shown by the demurrers and by the printed briefs

filed at that time and made a part of the record. (Rec., pp. 110-133.)

Upon mature consideration, Judge Goff in 1897 overruled the demurrers and left the injunctions in full force, thereby sustaining the validity of the contracts. (R. 104).

Evidently regarding this decree as decisive of the case, the City made no further effort to dissolve the injunctions until January, 1923, over a quarter of a century later;--nor had the City attempted to collect any taxes during that period; so that, except in 1893 and 1894, it has for sixty-nine years recognized and kept its agreement, and has held and enjoyed the property granted and money paid to it therefor.

The case had been left off of the Docket by order of the Court in 1920 (R. 106). The City had it re-instated in January, 1921 (R. 106), and made no further move until eighteen months later, when it asked for a hearing on the exceptions to the Answer filed in 1894. Thereupon, the plaintiff moved to strike out the answer of the City on account of laches, abandonment and failure to do or offer to do any equity. (R. 107.)

In January, 1923, the City moved to dissolve the injunctions and dismiss the Bill (R. 108). This motion amounted to a renewal of the motion and demurrer of 1894, and identically the same grounds were set forth that had been considered and adjudicated in 1897 (R. 108).

The City nowhere made any claim that the railroad company had been in default or was guilty of any laches. It sought to excuse its own laches, but it presented no new question or any ground that had not been fully argued and considered on the motions and demurrers in 1895 and decided in 1897.

After full hearing on briefs and argument (R. 109), the Honorable W. E. Baker, Judge of the District Court in 1923, overruled the motion of the City, and perpetuated the injunctions. (R. 109).

The briefs filed on the original hearing thirty years before, were made a part of the record, in order to show the identity of the issues submitted and decided in 1895 and 1923. (R. 109.)

From this decree, the City took an appeal to the Circuit Court of Appeals for the Fourth Circuit.

The case was argued on May 23, 1923, and the decree of the District Court was reversed and appellant's bills dismissed on December 17, 1923, by a divided court,—the Hon. Charles A. Woods and the Hon. D. L. Groner reversing, and the Hon. Edmund Waddill dissenting. The dissenting opinion appears, Record, p. 174.

Thus three Judges—two of the Circuit Court of Appeals, Judges Goff and Waddill, and District Judge Baker—have sustained Appellant's claims; and two Judges—Judge Woods of the Circuit Court of Appeals, and District Judge Groner—have denied them.

The majority opinion of the Circuit Court of Appeals holds that the deed, contracts and ordinances did not and could not commute taxation, and are invalid because *ultra vires*; that no right to such commutation or to any equity in the property conveyed therefor, or to any moneys received by the City, passed to appellant; that the ordinances of 1865, 1867, and 1870, (each of which re-affirmed the contract and deed as in full force), made no reference to such rights, and did not continue them; that the conduct, the acquiescence and laches of the City, either before or after suit, in no way affected its rights or estopped

it from repudiating all such agreements and ordinances, or from keeping and enjoying the property and money paid thereunder; that the decision of Judge Goff in 1897, overruling the demurrers and motion to dissolve, did not settle the principles of the cause, or involve the merits thereof; that the acquiescence of the City in that decision, and its abandonment of its claims for twenty-five years therein, were of no effect; that the deed and contracts while merely ultra vires and not involving any moral turpitude; yet conferred no right or equity upon your petitioner to any real estate, wharfage fees, or money paid to the City as consideration for commutation of taxes; but that the City had the right to repudiate the deed and contracts as invalid and to retain and enjoy all of said consideration without any accounting therefor.

ASSIGNMENT OF ERRORS.

The assignment of errors appears, Record pp. 196-199, as follows:

It was error—

1. To reverse and set aside the decree entered on the 7th day of February, 1923, in favor of the Baltimore and Ohio Railroad Company in and by the District Court of the United States for the Northern District of West Virginia.
2. To refuse to uphold and affirm the said decree entered by the District Court of the United States for the Northern District of West Virginia.
3. To dismiss the bill and amended bill of the petitioner, filed in the said District Court; and to deny to the petitioner all relief in the premises.
4. To hold and to decide to be void and not binding

upon the City of Parkersburg, the following contracts, records and deeds; that is to say:

(a) The ordinance of June 8, 1855, authorizing the execution of a deed between the Town of Parkersburg and the North Western Virginia Railroad Company, shown at page 18 of Record.

(b) The deed of that same date, June 8, 1855 (Record, p. 20), between Parkersburg and the North Western Virginia Railroad Company, whereby in consideration of the grants, conveyances, covenants and stipulations, the sum of one dollar, the town grants the use of certain portions of the lands, banks, shores and other water rights, on certain conditions; and (Rec., p. 21) the town for like consideration grants and covenants with the Railroad Company that "all the property owned, used or occupied by the Company so long as same is used or appropriated by them to purposes connected with the business of the railroad, shall be free from all town taxes, assessments and charges. * * *" In consideration whereof, the Railroad Company grants and conveys to the Town valuable real estate set forth on page 21, and on page 22. The Company was required to construct a wharf along the Little Kanawha and Ohio Rivers, and three years thereafter construct a similar wharf for sixty feet on the Ohio River, to be owned by the City.

(c) The ordinance of April 10, 1865, by Section 3 thereof (p. 23) reference is made to former ordinances and to "the agreement between Parkersburg and the North Western Virginia Railroad Company, dated June 8, 1855, and all other ordinances and parts of ordinances heretofore passed and accepted by the Northern West Virginia Railroad Company, are hereby declared to be in full force and binding on the City of Parkersburg, and

the Parkersburg Branch Railroad Company as the successors of the former parties thereto."

(d) The ordinance of May 10, 1867 (p. 23) which provided by Sec. 1, that the Parkersburg Branch Railroad Company—late North Western Virginia Railroad Company—are hereby authorized and empowered to construct and continue their railroad with single track, etc.

By Sec. 3, "the deed and agreement of June 8, 1855, and all other ordinances heretofore passed by Parkersburg and accepted by the North Western Virginia Railroad Co., are hereby declared in full force and binding on the City of Parkersburg and the Parkersburg Branch Railroad Company as successors respectively of the former parties thereto." (Record, p. 24.)

(e) The ordinance of March 15, 1870 (p. 27), authorizing the construction of a bridge and approach across the Ohio River, and providing that the payment by the Parkersburg Branch Railroad Company to the City of seven thousand five hundred dollars, shall be received in discharge of the requirement for building the wharf at the foot of Court Street on the Ohio River, as contained in the deed of 1855.

5. To hold and to decide that upon the foreclosure of the mortgage of the North Western Virginia Railroad Company in 1865, no right to any commutation of taxes, and no right or equity to any consideration paid therefor, passed to the purchaser.

6. To hold and to decide that the decree of the United States Circuit Court (now District Court), in 1897, overruling the demurrers and leaving the injunctions in force, did not determine or settle the merits or principles of the cause, and did not sustain the validity of the deed and contracts.

7. To hold and to decide that the said City was not affected or estopped by its laches and conduct in recognizing and in performing the said deed and contracts from 1855 to 1894—a period of thirty-nine years, during all of which no claim to taxes had been asserted by the City, and to hold that the City was not affected or estopped by its subsequent acquiescence for twenty-five years additional in the decree entered on the 13th day of July, 1897, in the District Court by the Honorable Nathan Goff, Judge of the Circuit Court, then sitting, whereby the demurrers interposed by the City were overruled, to the bill and amended bill of the plaintiff and appellant.

8. To hold and decide to be null and void the contract of 1855 and the several ordinances made and passed by the City of Parkersburg in the years 1865, 1867 and 1870, confirming, ratifying and continuing in full force and binding upon the City and the Railroad Company, the covenants and provisions of the original ordinance and contract, and all other ordinances passed on that subject.

9. To hold and to decide that the action of the State and the City in assessing and levying taxes upon the property of the Railroad Company in 1893 and 1894, was not illegal and did not impair the obligation of the contract of 1855, and all subsequent ordinances and contracts in violation of Section 10 of Article 1 of the Constitution of the United States forbidding a State from passing any law impairing the obligation of contracts.

10. In failing to hold and to decide that the Commutation Contract contained in the agreement and deed of the 8th day of June, 1855, was valid and binding when entered into, and that the general assessment laws of

West Virginia, under the authority of which the assessment and levy complained of was made, impaired the obligation of that contract in violation of the terms of Sec. 10, Article 1, of the Constitution of the United States.

11. In failing to hold the action of the city in holding and remaining in possession of the property and consideration paid to it under the agreement and deed of June 8, 1855, and subsequent ordinances, and at the same time assessing and levying taxes upon appellant's property, was a taking of appellant's property, and deprived appellant thereof without due process of law, and was a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

12. To hold that the contracts in suit were ultra vires and did not involve any moral turpitude, and at the same time to deny and refuse to require the city to reconvey the lands or account for any moneys or property received by it for commutation of taxes under said contracts.

THE BALTIMORE AND OHIO RAILROAD CO.,

By J. W. VANDERVORT, of Counsel

FRANK W. NESBITT,
MASON G. AMBLER,
J. W. VANDERVORT,

Counsel

BRIEF OF ARGUMENT.

1. JURISDICTION IN THE DISTRICT COURT DID NOT DEPEND ENTIRELY UPON DIVERSE CITIZENSHIP, BUT ALSO INVOLVED FEDERAL QUESTIONS.

2. THE CONTRACT AND DEED OF 1855 WERE VALID. THERE WAS A COMMUTATION OF TAXES, NOT A BARE EXEMPTION.

3. THE RIGHTS UNDER THE CONTRACT AND DEED OF 1855 PASSED TO PURCHASING COMPANY AND WERE CONTINUED AND CONFIRMED BY THE CITY.

4. THE DEMURRER AND MOTION TO DISSOLVE, WENT TO THE MERITS OF THE CASE, AND THE DECISION THEREON IN 1897 SUSTAINED THE VALDITY OF THE SEVERAL CONTRACTS.

There was practical construction for seventy years.

5. IF THE CONTRACTS WERE ULTRA VIRES, THE CITY SHOULD BE REQUIRED TO MAKE RESTITUTION.

ARGUMENT.

I.

JURISDICTION IN THE DISTRICT COURT DID NOT DEPEND ENTIRELY UPON DIVERSE CITIZENSHIP BUT ALSO INVOLVED FEDERAL QUESTIONS.

The original bill of the plaintiff sets up and relies upon the contract and deed of June 8, 1855, whereby, for full consideration the City granted and agreed upon a commutation of taxes; and the plaintiff also relied upon the ordinance of the same date—a part of the same trans-

action—which by Section 6 (Record, p. 20) enacted that all the property of the Company within the town, while the same continues to be used by the Railroad Company for, or is appropriated to the business of their road, shall be free from all town taxes and assessments.

By the bill, it was averred and charged that from the 8th day of June, 1855, and thence forth until the beginning of this suit no claim of assessment had been made for taxes, and no question raised thereon; but that the commutation and exemption have always hitherto been ratified and confirmed by the City of Parkersburg; that in 1893 the Mayor of the City notified the Auditor of the State of West Virginia to proceed under the laws of the state to compel the Sheriff of Wood County, John W. Dudley, to collect the taxes and assessments on the property for the year 1893, and the Sheriff had levied for said taxes on the property of the Railroad Company, and had seized a certain locomotive to satisfy the same. (Record, p. 7.)

The bill further alleged that the City of Parkersburg could not with impunity violate its covenants and agreements with the Railroad Company, as the successor in title and right of the Northwestern Virginia Railroad Company, and that it was in bad faith, unjust, inequitable, and fraudulent on the part of the said City, after having for more than thirty years had the benefit and advantage of the property conveyed to it by the Northwestern Virginia Railroad Company, and after having for more than twenty years, had the sum of seventy-five hundred dollars paid into its Treasury by the plaintiff, in consideration of said release, commutation and exemption from taxation by said City, to ignore, violate and repudiate said deed and contract, and its obligations under the same. (Record, p. 8.)

In the amended bill filed by the plaintiff (Record, p. 91) it is alleged that the Town of Parkersburg in 1855 had the right, and was not prohibited from making said deed and contract, and that there was nothing in the constitution or laws of the State of West Virginia, which in any wise inhibited such contract, and that nothing in the constitution and laws of the State of West Virginia, *subsequently adopted or enacted thereafter could in any wise alter or impair the validity of said contract or the obligation thereof.* (Record, p. 97.)

It is further alleged that the City of Parkersburg cannot, *under the law of the land*, with impunity violate its covenants and agreements with the plaintiff; and that it was in bad faith unjust and fraudulent on the part of the City after receiving the benefit of the property and money paid in consideration of the release, commutation and exemption from taxation by the City, to ignore, violate and repudiate the said deed and agreement and contract, *and its obligations thereunder* (Record, p. 99.)

On May 7, 1894, (Record, p. 31) the City by its demurrer denied the validity of the alleged contract.

On June 14, 1894, (Record, p. 32), the answer of the City (at page 35) denies the validity of the deed of June 8, 1855, and the commutation thereby granted, and claims that there was no authority to grant such exemption or commutation.

The answer (at page 36) alleges, that if the commutation was valid, yet it was only to be enjoyed at the pleasure of the legislature of the State of West Virginia and the City Council of the City of Parkersburg; and that the Legislature of the State of West Virginia by Act of February 28, 1877, and amendatory acts, took away from and out of the power of the city the right to

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assess, levy and collect any taxes upon the property of Railroad Company, and vested the power of assessment and collection of such taxes in the Board of Public Works, and the Auditor of said State.

The answer further alleged that by subsequent statute of the State of West Virginia, exemptions had been prohibited (Record, p. 38).

On July 13, 1897, (Record, p. 104,) The District Court (formerly the Circuit Court) overruled all the demurrers, and sustained the validity of the contract by deed and the ordinance of 1855 and the subsequent ordinances.

The Circuit Court of Appeals, by its decree and final judgment entered December 17, 1823 (Record, p. 193) dismissed the bills and denied all relief to the Baltimore and Ohio Railroad Company.

In the dissenting opinion by Judge Waddill (Record, pp. 180-181) after upholding the validity of the deed and contracts, says:

“But the position is untenable for another reason. What was done as to the release of taxes was by commutation as above shown, and hence was a payment and not a relinquishment of the tax, and was the acquisition of property for valuable consideration, a contractual obligation binding on the city, and which enured to the railroad, and which the former cannot escape from, or cast off at its will and pleasure, but which passed to the railroad as the purchaser of the property and its *rights thereto and title therein are protected under the contract and due process clauses of the Federal constitution.*”

Citing Cooley on Taxation (3d Edition), page 126:—

“There is no room for any question, therefore, that when the State has stipulated by contract to give exemption from taxation, or has commuted an uncertain tax

for a definite and fixed sum or sums, and *afterwards undertakes to tax* in the same manner as it taxes other subjects, persons, corporations, or property which was the subject of the exemption or commutation, *the obligation of the contract is impaired.*”

1. The plaintiff was a citizen of Maryland, and the City of Parkersburg was in law a citizen of the State of West Virginia, but as above shown, in addition to diversity of citizenship the bills allege the validity of the contracts and deny the right of the state and municipal authorities to alter or impair the obligation thereof by after-enacted state laws.

It is also shown that the action of the state and municipal authorities, deprived the plaintiff of contract and property rights without due process of law. These matters were not only set up in the plaintiff's bills, but were also presented by the City on demurrer and answer. Thus the jurisdiction of the District Court did not depend entirely on diverse citizenship, but involved the contract and due process clauses of the Federal Constitution. The judgment of the Circuit Court of Appeals was therefore not final, and the right of appeal to this court exists.

Sec. 241 of the United States Judicial Code, 39 Statutes 727,
and Sec. 128 of the Judicial Code, 38 Stat. 804.
Union Pacific R. R. Co. vs. Harris, 158 U. S. 326.

When a bill of complaint shows that, either pursuant to an invalid statute or ordinance, or under color, but in excess of the powers conferred either by statute, ordinance, or other state authority, action is taken or threatened to deprive the complainant of contract or property rights in contravention of the Federal Constitution, a Federal question is presented unless it plainly appears that such averment is not real and substantial,

but is without color or merit. Such a question being presented, the United States court has jurisdiction to determine the entire controversy, including all questions, whether Federal or not, and irrespective of how the Federal question is decided, or whether it is decided at all.

Siler vs. Louisville & N. R. Co., 213 U. S. 175,
53 L. Ed. 753, 29 Sup. Ct. Rep. 451.

Home Teleph. & Teleg. Co. vs. Los Angeles, 227
U. S. 278, 57 L. Ed. 510, 33 Sup. Ct. Rep. 312.

Cuyahoga River Power Co. v. Akron, 240 U. S.
462, 60 L. Ed. 743, 36 Sup. St. Rep. 402;

Green v. Louisville & Interurban R. Co. 244 U. S.
499, 61 L. Ed. 1280, 37 Sup. Ct. Rep. 673,
Ann. Cas. 1917E, 88.

Cincinnati vs. Cincinnati & H. Traction Co., 245
U. S. 466; 62 L. ed. 389, 38 Sup. Ct. Rep. 153.

“All that is necessary to establish the jurisdiction of the Court, is to show that the complainant had, or claimed in good faith to have, a contract with the City, which the latter had attempted to impair. * * * * *
And so long as the claim is apparently in good faith, and is not frivolous, the case can be heard and decided on the merits.”

Pacific Electric Railway Co. vs. Los Angeles, 194
U. S. 112, 118.

Illinois Central Railroad Co. vs. Adams, 180 U.
S. 28.

Where the opinion of the court is annexed to and forms a part of the record, it may be examined also to ascertain whether either party claimed, and was denied, a Federal right.

Loeb vs. Columbia Township Trustees, 179 U. S.
472, 483, 485.

In Mobile & Ohio Railroad Co. vs. Tennessee, 153 U. S.
46, it was held that state statutes which subjected the

property of a railroad corporation to taxation, impaired the obligation of a contract where the company's charter embraced a clause exempting it from taxation.

A law enacted subsequent to a contract, which, if valid, will have the effect of annulling that contract, constitutes the most palpable form of Legislative impairment, and such an enactment is clearly unconstitutional.

Red Rock vs. Henry, 106 U. S. 596.
Los Angeles vs. Taylor, 105 U. S. 454.
12 Corpus Juris 1057.

In New Jersey vs. Yard, 95 U. S. p. 104, it was held, that where a charter was subject to amendment and alteration, yet an amendment to the charter would not affect a *contract* as to taxes made between the State and the corporation.

2. A contract of exemption from taxation may be impaired by wrongful construction, as well as by an unconstitutional statute attempting a direct repeal.

Perry vs. Norfolk, 220 U. S. 472.

The legal existence of the contract itself and its proper construction is necessarily involved in the question of the alleged impairment of the obligation thereof. The Supreme Court has the power, in order to determine whether any contract has been impaired, to decide for itself, what the true construction of the contract is.

Mobile & Ohio Railroad Co. vs. Tennessee, 153 U. S. 495.

Milwaukee E. R. & L. Co. vs. Wisconsin 252 U. S. 100.

Bryan vs. Board of Education, 151 U. S. 639.

Huntington vs. Attrill, 146 U. S. 657.

Jefferson Branch Bank v. Skelly, 1 Black 446.

3. The facts alleged in the bills show a clear attempt by state and municipal authorities to deprive the plaintiff of contract and property rights without due process of law. The statement in the bill that these acts were contrary to "the law of the land," is equivalent to the term "without due process of law."

The term "due process of law" as used in the Federal Constitution has been repeatedly declared to be the exact equivalent of the phrase "law of the land."

Davidson vs. New Orleans, 96 U. S. 97.

Dent vs. W. Va., 129 U. S. 114.

6 Ruling Case Law, p. 437.

In Ward vs. Love County, 253 U. S. p. 17, p. 24, the collection of unlawful taxes assessed on lands exempt from taxation was held to be in contravention of the Fourteenth Amendment.

The appellant has, out of abundant caution, filed its petition and brief for a writ of certiorari, in order that this case may be reviewed by this Honorable Court, if there should be any technical question as to the right of appeal. We respectfully refer to said petition and brief and the grounds stated therein, showing additional reasons why the decree of the divided Circuit Court of Appeals should be reviewed and reversed.

II.

THE CONTRACT AND DEED OF 1855 WERE VALID. THERE WAS A COMMUTATION OF TAXES, NOT A BARE EXEMPTION.

The provisions of the Parkersburg charter have already been set forth. These gave the Town full power to purchase, receive, possess, and convey any real or personal estate for the use of the town, and also full

power to pass any by-laws or ordinances for the improvement of the town, and for such other purposes as the President, Recorder and Trustees *might deem necessary* for the safety and *convenience* of the town and the inhabitants thereof, provided such by-laws and ordinances were not contrary to the laws and constitution of the State of Virginia or of the United States.

Here was a large discretionary power conferred upon the authorities of the town. Almost the same language occurs in *Jones vs. Richmond*, 18 Gratt. 517, where the Council was empowered, "to pass all by-laws and regulations which they shall deem necessary for the peace, convenience, good order or safety of the City or of the people and property therein." The Court said, "It is hard to conceive of *larger terms* for the grant of sovereign legislative powers, than those thus employed in the Charter and they must be taken by necessary and unavoidable intendment to comprise the power of eminent domain." The Court, under this language, sustained the validity of contracts made by the City with persons whose property the City had seized and destroyed, and overruled the City's plea of *ultra vires*.

The State of Virginia, until 1892 was most liberal in its tax exemption policy.

In *Danville vs. Shelton*, 76 Virginia 325, the Supreme Court expressly held that a town had the right to grant naked exemptions from taxation, and that whether the Council was judicious in the selection of the subjects of exemption, was a matter addressed to the sound discretion of the Council. The Court cites numerous Virginia decisions in support of this proposition.

In *Williamson vs. Massey*, 33 Gratt. 242, the Virginia Court approved the custom then prevailing, whereby City

Councils granted exemptions to manufacturing and industrial enterprises, which contributed to the upbuilding of their population and prosperity, and held that there was no constitutional prohibition against such practices.

In *City of Richmond vs. R. & D. R. R. Co.*, 21 Gratt. 604, the Court speaks of the great benefits that the construction of the railroad had conferred upon the City; and at page 614 says:

"The influence of railroads is felt in the progress and extension of manufactories and commerce in an ever increasing demand for the products of agriculture, and in the rapid development of the resources of the country. An enlightened policy appreciating these advantages, invites the investment of capital in such enterprises by granting liberal exemptions from taxation."

It was under such conditions of public policy, backed by decisions of the highest court, that the ordinance and deed of 1855 were entered into by Parkersburg and the railroad company.

From 1855 until 1892, a period of 37 years, no doubt had been expressed as to the validity of such an agreement even where the exemption was naked.

The Statutes of Virginia and of West Virginia expressly recognized exemptions as to railroad companies; and, as already stated, the Legislature of West Virginia by Acts of 1875, Sec. 67, of chapter 54, provided: *"The property exempt from taxation by the charter of such company or otherwise, shall not be assessed."*

Substantially the same provisions were contained in prior statutes, and remained the law in West Virginia until 1881, when exemptions were prohibited by Section

67 of chapter 12 of the Acts of the West Virginia Legislature. This Act affected only bare exemptions. It could not affect or impair the validity of contracts commuting taxes made long prior thereto.

It was not until 1892, that the Supreme Court of Virginia by a divided court—two judges dissenting—changed its rulings and held, that under the Virginia Constitution of 1870 municipalities did not have the power to grant exemptions. This case presented an extreme abuse of the power.

At that time West Virginia was no longer a part of Virginia, and the decision was not authority in West Virginia; but it was the inspiring cause behind the action of the City of Parkersburg in 1894, in then attempting, for the first time, to repudiate and nullify all obligations on her part under the deed and several ordinances mentioned. During all of this time there had been no doubt as to the validity, much less the fairness, of these agreements.

The majority opinion in the case at Bar makes no mention of these facts, but they are emphasized in the dissenting opinion of Judge Waddill (p. 177). We respectfully submit that they are of great weight, especially is this true when Judges Goff, Baker and Waddill, all of whom were particularly well versed in the laws and customs of Virginia and West Virginia *as residents* of those states—have sustained these agreements as valid and binding.

This Honorable Court has in many cases, where there has been a change of view by the State Court, followed the first decision of that Court, and where rights have vested, or if the action was to enforce contract rights, the

United States Courts have generally followed the law as it was declared by the State Court when the contract was entered into. In other words, Federal Courts on questions of general law are not bound by state court decisions. They have many times applied an equitable doctrine and held to a rule which sustains a contract legal when entered into according to the then existing decisions of the State Court; but which afterwards was held illegal by the State Court.

Chicago vs. Sheldon, 9 Wallace 50-55.

Los Angeles vs. Los Angeles City Water Co.,
177 U. S. 558; 44 L. Ed. 886.

Great Southern Fire Proof Hotel Co. vs. Jones,
193 U. S. 532; 48 L. Ed. 778.

National Mutual Building Association vs.
Braham, 193 U. S. 635; 48 Lawyers' Ed. 823.

Wade vs. Traverse County, 174 U. S. 499; 43 L.
Ed. 1060.

So in Burgess vs. Seligman, 107 U. S. 20, Syl. 4,
it is held:

“When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions of the state tribunals, or when there has been no decision, the courts of the United States assert the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be given by the State courts after such rights have accrued.”

The right to grant *naked* exemptions was recognized during the long period as above stated.

The right therefore necessarily existed to *commute* taxes by the payment of valuable consideration therefor. The difference between these two classes of exemptions has been pointed out in the dissenting opinion and in the brief filed in support of the petition for certiorari.

The majority opinion does not make this distinction, but apparently treats the ordinance and deed on the basis of a naked exemption and applies the severest rules of construction to them on that theory.

It is suggested that these agreements were to settle conflicting titles to real estate. This is based on a memorandum filed by the City Council six weeks after the deed was executed. It is an *ex parte*, self-serving statement. Neither the ordinance nor the deed mention any matter of this character. There is nowhere any claim by the City to these lands at any time. On the contrary the city had sought to buy them.

The Answer of the city makes no claim of this character, nor does the brief of its counsel, filed thirty years ago. But had a compromise of conflicting titles been among the considerations involved, that would not improve the City's position.

In *New Jersey vs. Yard*, 95 U. S. 116, conflicting claims were compromised, and the court said:

"Here was a subject of disagreement adjusted, additional rights granted, and a tax fixed both as to the right and time of commencement. Can it be believed that it was intended by either party to this contract that after it was signed by both parties, one was bound forever, and the other only for a day?"

The same rule was applied in *State vs. B. & O. R. R. Co. Md.*, 96 Atlantic 636, where conflicting claims were adjusted. This was held to be a consideration of the highest character.

"The same fair dealing which is in force between individuals must be applicable where the parties are a state and a corporation having contractual relations with the state. The state can no more retain the benefits

derived or to be derived by the other party to the contract than can the individual."

And, so, in *Stearns vs. Minnesota*, 179 U. S., at page 240,—

"A contractual exemption of the property of the Railroad Company in whole upon consideration of a certain payment, cannot be changed by the State so as to continue the obligation in full, and at the same time deny to the Company either in whole or in part, the exemption conferred by that contract."

The consideration received by the City was not only the building of a railroad, but (1) inducing the Railroad Co. to bring its terminal and works within the limits; (2) the fee simple title in perpetuity, to all the Ohio River lands; (3) construction of a wharf at First Street; (4) payment later of \$7,500.00, in lieu of another wharf at Third Street; (5) the right to charge wharfage fees on shipping, which meant large revenues; the amount of which the City has not disclosed.

In view of these facts, the cases cited on bare exemption, have no application. This was a contract, in which the City received valuable consideration in land and revenue producing property in payment for taxes on property "so long as the same is used or appropriated for purposes connected with the business of the railroad."

The majority opinion holds that even under modern constitutions "a contract by a municipal corporation to allow all or part of taxes on property in payment for a *continuous service*, is not an exemption, and may be valid." Citing many cases. Syll. 3, 296 Fed., p. 74 (Rec. p. 165.)

In *Bartholemew vs. Austin*, 85 Fed. 359, a contract was sustained between the city and a water company under

which the property of the Company was exempt from taxation in consideration of the free use of water by the city. The Court said "we do not construe the contract as granting an exemption from taxation. Exemption means free from liability or duty. It is a grace or favor"; but that here consideration was given for taxes. "On a comparison of values, the parties being competent to contract, it was concluded that the values were equal, and that the one should be offset by the other. There is no claim that one value was not as great as the other. No imposition on the one hand or favoritism on the other, can be inferred."

This is true of the Case at Bar. There is no claim that the equivalent of taxes was not received by the City. No claim of imposition or unfairness. The forty years of entire satisfaction with this arrangement is strong evidence of these facts. The city claims it had full power to accept all benefits under the contracts but had no power to perform the promise on the faith of which it received these benefits.

In *Philips vs. City of Portsmouth*, 115 Virginia 180; 78 S. E. 651, the Court held,—

"A provision of the contract between the City and the Water Company, that the rental for water should be increased by the amount of any city tax on the Company's property or works, necessary for the supply of water, *was not an exemption* of the property or works from city taxation; and hence the right to such increased rental passed to another company with which the contracting company subsequently merged or consolidated."

It has also been held that Municipal Corporations, under their general powers to contract, may make agreements whereby the City pays or remits taxes on property leased by it to individuals or corporations, and this is true although *the taxes may exceed the rent*.

Hampton Beach Co. vs. Hampton (N. H.) 92
Atl. 549.

“An exemption from taxation is in the nature of a gratuity, while the agreement here is a part of the consideration for the payment of a certain rental.”

The same rule was applied in *Boston Molasses Co. vs. Boston*, (Mass.) 79 N. E. 827; and the Court said:

“Having chosen to descend from the plane of its sovereignty and to make this contract with a private person, it is to be regarded as itself a private person, and is bound as such. *Hall v. Wisconsin*, 103 U. S. 5, 11; 26 L. Ed. 302. As was said in *People v. Stephens*, 71 N. Y. 527, 549, ‘The state, in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign and another for the subject; but when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract in any form comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the contractor, dealer and suitor.’ ”

In *Cooley on Taxation* (3rd Ed.) page 108, it is said:

“The pledge, in order to constitute a contract, must have the elements of a contract, and the vital elements are consent and consideration. * * * * * There must be something received by the State for the relinquishment, or something surrendered on the other side which can be deemed a *legal equivalent*.”

“The case is still plainer if the state receives a bonus or other valuable consideration for the grant stipulating in the grant to give exemption from taxation, or if it made the grant to a corporation, on the surrender by it of valuable rights.”

At page 110, Cooley says, "Where a certain sum is specified for a certain percentage upon valuation or upon receipts or acquisitions in any form, this is in the nature of a *commutation* of taxes, the state agreeing that the sum named is, under the circumstances, *a fair equivalent* for what the customary taxes would be, or the fair proportion which the person bargained with ought to pay, and the power thus to commute is undoubted. And this rule applies when a bonus is paid for complete future exemption, to the same extent and on the same reasons as when the commutation is for an annual payment."

In equity there would seem to be no difference in principle if equivalents are given and received by the respective parties to such contract. So here, if the City has received from wharfage charges, rentals or the use of real estate or from interest on money, the amount of taxes released or commuted by it, and more, how has it been prejudiced? Where is the inequity? The fixed determination of the city to hold and retain all that it has received, and to make no disclosure of benefits or offer to do equity, is evidence of the high value it places on the considerations it received.

"Strict rules of construction will not be applied to a contract commuting taxes.

37 Cyc. 894.

Traverse County vs. St. Paul (Minn.) 76 N. W. 217.

Binghamton Trust Co. vs. Merrill (Wis.) 96 N. W. 686.

It will be seen from an examination of these cases that the presence or absence of consideration is a potent influence in determining whether the construction shall be liberal or strict.

New Jersey vs. Wilson, 7 Cranch, 164.
Wisconsin Co. vs. Powers, 191 U. S. 379.
Choate vs. Trapp, 224 U. S. 665.
New Jersey vs. Yard, 95 U. S. 104.

The invariable rule of the courts in considering questions of validity in municipal contracts, is to indulge every presumption in their support.

“Where contracts have been made, acts done, and labor performed in pursuance of a city charter, acquiesced in by all its citizens, such interpretation will be sustained if justified by any possible reading of the statutes.”

Memphis vs. Brown, 20 Wall. 289; 22 L. Ed. 264.
28 Cyc. 675.

Reed vs. Anoka (Minn.) 88 N. W. 981.

Lincoln vs. Sun Vapor Co., 59 Fed. 756; 8 C. C. A. 253.

III.

THE RIGHTS UNDER THE CONTRACT AND DEED OF 1855 PASSED TO THE PURCHASING COMPANY AND WERE CONTINUED AND CONFIRMED BY THE CITY.

The majority opinion holds that upon the foreclosure of the Northwestern Virginia Railroad Company mortgage in 1865, no right to the commutation or to any consideration paid therefor, passed to the purchaser. The authorities cited in support, involved only naked exemptions. Under this holding, if the Northwestern Co.'s mortgage had been foreclosed the day after the deed was made, no right, benefit, or equity as to the tax covenant, would pass to the purchaser. No amount paid to the City for this covenant would continue it in force.

Our contention here is, that

1. Full consideration was paid for the commutation. It was not a gratuity, but a right for which the City received the complete equivalent. Therefore, the cases on bare exemptions do not apply. This was a contract or property *right* which passed on the sale.

Under Sec. 29, chapter 61, of the Virginia Code of 1860, already quoted:

“The corporation created by or in consequence of such sale and conveyance, shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been had or should have been performed by the first company, but for such sale and conveyance.”

Similar rights have been held to pass on sale.

Stearns vs. Minnesota, 179 U. S. p. 234.

New Jersey vs. Wilson, 7 Cranch. 164.

All right in a commutation contract between a Water Company and a City were held transferred on sale.

Philips vs. Portsmouth, 115 Virginia 180.

And where a commutation covenant in a deed was held invalid because *ultra vires*, the right to the consideration paid therefor, was held to pass to several successive purchasers.

Richmond vs. Virginia Power Co., 124 Va. 539,
98 S. E. 691.

2. The mortgages in 1853 covered after-acquired property. The river frontage was acquired after the mortgages were made. It was not released. The lands conveyed to the city therefore were taken from the mortgage assets, and would otherwise have gone to the purchaser at the foreclosure sale.

By the subsequent ordinances, 1865-70, the title of the City to the Ohio River lands, was confirmed and any question as to whether these after-acquired lands were subject to the lien of the mortgages of 1853, was thereby settled. This was a consideration of no small importance to the City.

3. The language of the tax covenant clearly provided for an exemption so long as the railroad property was used or appropriated to purposes connected with the business of the railroad. It was not intended that the city should have a title in perpetuity, and the railroad an exemption for a day; that one party would be bound and the other not.

4. The City expressly confirmed and continued all of the provisions of the ordinance and deed of 1855, after the sale, by ordinances of 1865, '67 and '70, and accepted additional consideration. The same authority existed in the city in 1865-1870 that it had in 1855 to make this contract.

The majority opinion by drastic construction says, that the tax covenant was not included, because not separately set out in express terms, and that the railroad company, by Sec. 3 of these ordinances, obtained only "*the right to use steam on its trains.*" (Rec. 173).

We have already quoted these ordinance provisions which recite that the Parkersburg Branch Railroad Co. was late the Northwestern Virginia Railroad Co.; and Sec. 3, in explicit terms, refers to the deed and agreement of June 8, 1855, and declares it to be in full force and binding on both parties.

If the provisions of the deed were to continue in *full* force, how could the main covenant for the benefit of

the Railroad Company be excluded? There are six separate provisions in the ordinance of 1855 (R. 18-20). No one of them is specified in the confirming ordinances. But the effect of the majority opinion is to confirm every provision for the benefit of the City and to eliminate the chief benefit to the railroad company for which the consideration was granted. These ordinances do not say, that the deed "shall remain in force, *except the tax covenant*," but that the complete deed and agreement shall remain in *full force*.

How can the main consideration agreed to be furnished by the City be stricken out and yet the agreement be continued in full force and effect? Is not this making a wholly different contract from that which the parties agreed upon and intended?

5. If there could be any doubt as to what the parties intended the subsequent action of the city in never assessing or claiming any taxes from 1865 until 1893, is strong evidence that the railroad's contention is right.

"Contracts should be read in the light of the public policy entertained, and the purposes sought to be accomplished *at the time they were made*, rather than at a later period, when different ideas and theories may prevail." Long continued practical construction is strong evidence of the intention of the parties.

Chicago vs. Sheldon, 9 Wallace 50 p. 54, 7 years.
Mobile & Ohio Railroad Co. vs. Tennessee, 153
U. S. pp. 46-52. 14 years.

United States vs. Union Pacific R. R. Co., 91
U. S. 72.

Platte vs. Union Pacific Railroad Co., 99 U. S.
48, 64.

Bank vs. Parker, 192 U. S. 78.--construction for
58 years.

Potter vs. Hall, 189 U. S. 292.

Stearns vs. Minnesota, 179 U. S. p. 233.

“It is worthy of note that the alleged invalidity of this contract in respect to taxation was not complained of for thirty years.” Page 254,—to same effect.

Wright vs. Central R. R. Co., 236 U. S. 674, p 678.

Practical construction for nearly half a century, is strong evidence that the Railroad Company’s contention is right.

In Central Ga. Railroad Co. vs. Wright, 248 U. S. 527:

“The contracts in question are of a kind that go back to the time when railroads were barely beginning, and would not be likely to be repeated; but, of course, they will be carried out by the State, according to what was meant when they were made.”

All that is asked here, is for a fair and reasonable construction of these ordinances viewed in the light of the times when made, and the acts of the parties thereunder during a very long period.

Cases like Rochester Railway Co. vs. Rochester, 205 U. S. 236, we respectfully submit, do not apply. That case involved an exemption from special assessments from paving. There was nothing in the nature of any payment or commutation for municipal taxes. There was no subsequent *recognition or renewal* of the exemption by the City; but it was denied and contested.

The Court says, p. 248: “The State, by virtue of the same power which created the original contract of exemption, may, either by the same law or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title.”

So, in the case of Chesapeake & Ohio Railroad Co. vs. Miller, 114 U. S. 176. This case was urged by counsel for the City, but was not cited in the majority opinion. It presents a peculiar charter exemption, based on a fixed percentage of the profits of that particular company. There was nothing in the nature of a commutation. The charter of the purchasing company had been amended so as to omit from it altogether a clause containing an exemption from taxation. (p. 182.) There was no attempt to ratify or continue the privilege but to extinguish it.

The Court held, at page 187, "*That as no consideration moved to the State for a renewal of the grant,*" there was no reason to apply a liberal construction, and transfer a naked exemption to the purchaser.

No case has been found, where under a commutation contract it is held, that neither the right to the commutation nor any right to the consideration paid therefor, passed to a purchaser or assignee. On the contrary, many cases have held that a bare exemption is such a right or privilege as will pass to another company.

Humphrey vs. Peques, 16 Wallace 244.

Chesapeake & Ohio Railroad Co. vs. Virginia, 94 U. S. 718.

Tennessee vs. Whitworth, 117 U. S. 139, 146.

Wright vs. Ga. Central Railroad Co., 236 U. S. 674.

IV.

THE DEMURRER AND MOTION TO DISSOLVE, WENT TO THE MERITS OF THE CASE, AND THE DECISION THEREON IN 1897 SUSTAINED THE VALIDITY OF THE SEVERAL CONTRACTS.

The grounds stated in the demurrers raised every

question of merit, and were directed to the validity of the several contracts.

The briefs filed in 1895 in support of the demurrers exhaustively argued the same propositions considered and decided by the Circuit Court of Appeals.

The dissenting opinion says, "the demurrer raised precisely the legal questions constituting the heart and substance on the ruling of the majority here." (R. 187.)

The majority opinion says, "under the bills and demurrers the validity of the attempted tax exemption was elaborately argued before Hon. Nathan Goff, Circuit Judge. * * * * * Thereafter, on August 11th, 1897, the City filed its answer to the amended and supplemented bill reiterating the defenses set up in the answer to the original bill, and again alleging the invalidity of the ordinances and contracts of the City Council." (R. 163.)

Thus it appears that the demurrers went squarely to the merits of the case, and that the answers raised identically the same questions. The majority opinion gives no effect to the further fact that the city then abandoned the case after three years of litigation from 1894 to 1897. It made no further effort to dissolve the injunctions or take any other action until twenty-five years later when it in effect renewed its former demurrer by motion to dismiss, and without bringing any new matter into the record, assigned the same grounds that had been presented and decided in 1895 and 1897.

In *Wisconsin Co. vs. Powers*, 191 U. S. 379,—a demurrer was sustained to a bill which put in issue the validity of tax exemption, and this was held to be a final adjudication.

In *Bowdoin College vs. Merritt*, 63 Fed. 213, it was held, that a decision on demurrer is the law of the case on motion to dismiss.

In *Brown vs. Fletcher*, 203 Fed. 70, "Defenses pleaded in an answer, which were in substance determined adversely to the defendant, on demurrer, will not be again considered."

In *Fish vs. McGann* (Ill.) 68 N. E. 761—"When a demurrer is interposed to a pleading, which the court overrules, and the defendant elected to abide by the demurrer, the judgment thereupon was conclusive of the facts confessed by the demurrer. The facts alleged in the pleading are in such case admitted of record by the judgment upon demurrer."

Alley vs. Nott, 111 U. S. 475.

In 21 *Ruling Case Law*, p. 529, "On demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue of fact, joined on the same pleading, and found in favor of the same party. It is a judicial determination of the legal sufficiency of the facts pleaded, and is as conclusive of the facts confessed by the demurrer, as a verdict finding them would be."

If there were any doubt as to the effect of the decision upon the demurrer, the long acquiescence of the City in that decision, and its abandonment of the cause should be held to conclude it..

"Good faith and early assertion of rights, are as essential on the part of the defendant in equity as they are on the part of the plaintiff."

Brown vs. Lake Superior Iron Co., 134 U. S. 530.

The City was the actor and aggressor. It actively sought to collect taxes and destroy contracts, and when enjoined it vigorously attacked the injunctions and sought to have the contracts cancelled and held void. Throughout these proceedings it was the active party. The Railroad Company merely sought to preserve the long existing status, and to protect its rights under the contracts, from the claims of the assaulting party. By the injunctions awarded, the destructive hand of the City was stayed, and the property of the Railroad Company was protected from the City's attack. The City failed to renew that attack until 1923. We respectfully submit it should be held to have abandoned any claim of right to do so.

The doctrine of practical construction applies where the parties have acted under contracts sustained by decree for seventy years.

It is clear that from 1855 until 1894, a period of thirty-nine years, the deed was recognized not only by three ordinances, but by continuous performance by all parties, without question or complaint.

It is also shown that there was complete acquiescence in the decision of Judge Goff overruling the demurrers to the bills in 1897, and that the City made no further effort to dissolve the injunctions until 1923—twenty-six years later; so that except for a brief period in 1894-95 the deed and ordinances have been fully observed for nearly seventy years.

The cases on practical construction have been cited under proposition II. of this argument. They involve elements of laches and estoppel, which also apply here.

The cases cited on estoppel in the majority opinion, generally concern transactions entered into contrary to

the express provisions of statutes. For example: *Thomas vs. City of Richmond*, 12 Wallace 349, involved the issuance of bills by the City of Richmond against the provisions of a penal statute. There is nothing of this character in the case at bar. The contracts were sanctioned by the decisions of the highest courts, as shown, and these very contracts were held valid by Judge Goff in 1897.

The doctrine of laches has been expressly applied by this Honorable Court to municipal corporations.

In the case of *Boone vs. Burlington Co.*, 139 U. S. 684, a delay of five years in a case involving fraud, was held to bar the county from relief. The court says, at page 693, "The appellant seeks to apply to the county, and its officers, in this case, the established rule that laches will not be imputed to a Government for a failure on the part of its officers to perform their duty; but this doctrine is not extended to such a municipal corporation as the County of Boone. *Metropolitan Railroad Company vs. District of Columbia*, 132 U. S. 1. The principle of ratification by laches or delay is as applicable to such a municipal corporation as it is to a private corporation or to an individual person."

In West Virginia, by Section 2 of Chapter 35, West Virginia Code, "Every statute of limitations, unless otherwise expressly provided, shall apply to the state." This has been the law since 1882, and was sustained and applied in *State vs. Miller*, 84 W. Va. 176.

By Section 33, Chap. 30, W. Va. Code, the limitation against suits for taxes is five years.

The cases on practical construction have already been cited, and embrace features of laches and estoppel, even

as against the state. The case at bar involves a longer period and more acts of estoppel than any cited.

In *Savannah vs. Kelley*, 108 U. S. 184, 191, the city sought by introducing the defense of *ultra vires* to avoid its liability for obligations theretofore issued by it. The Court, speaking through Mr. Justice Matthews, said "The authorities of the city at that time were only anxious to omit nothing which the most careful might regard as important in securing for its obligations all the weight and value properly belonging to an unquestionable pledge of its faith and credit; and certainly now after the lapse of twenty years, in which no such question has been raised, it would, in the language of Mr. Justice Greer in *Mercer County v. Hackett*, 1 Wall, 83, be contrary to good faith and common justice to permit them to allege a newly discovered construction of an equivocal power"; citing *Van Hostrup vs. Madison City* 1 Wall. 291; *Meyer v. City of Muscatine*, 1 Wall. 384; *James vs. Milwaukee*, 16 Wall. 159.

In *Grymes vs. Sanders and others*, 93 U. S. 55, 62, 63, a contract was sought to be rescinded on account of fraud and mistake; and the court at the last-named pages reviewed the subject generally, with authorities quoted holding that to entitle one to such relief, it must be sought promptly after the discovery of the alleged ground of action; that delay and laches are fatal, and a court of equity would never entertain such a request unless the parties could be placed in *statu quo*.

In *Alpena Water Co. vs. The City of Alpena*, 90 N. W. 323, the supreme court of Michigan, in construing the validity of a commutation of taxes, held, that the same having been acted upon by both parties for twenty years, that

time was sufficient to conclude the controversy if ever the same was to be ended.

In *Luddington Water Co. vs. Luddington*, the same court, on page 78 of 90 N. W., held a similar contract valid, and commented on the fact of its having been acquiesced in by the parties for a period of sixteen years.

“This is a suit in equity. In such a suit the claims of the Government appeal to the conscience of the Chancellor with no greater or less force than those of a private individual under similar circumstances.”

Hemmer vs. United States, 204 Fed. 898; 123 C. C. A. 194.

United States vs. Stinson, 197 U. S. 260, 204, 205; 49 L. Ed. 724.

Iowa vs. Carr, 191 Fed. 257; 112 C. C. A. 477.

V.

IF THE CONTRACTS IN SUIT WERE ULTRA VIRES, THE CITY SHOULD BE REQUIRED TO MAKE RESTI- TUTION.

The majority opinion holds void five agreements: The ordinance and the deed of 1855, the ordinances of 1865, 1867 and 1870, so far as they in anywise concern commutation of taxes.

It is not claimed in the opinion that these contracts were prohibited by law, but that the city simply lacked the power to make them. At the same time by strong implication at least, the appellant Railroad Company is treated as a wrong doer, and is made to forfeit property and money while the City is given the right to hold all that it has received under these contracts, and is also given

the right to tax the property of the Railroad Company and to recover back taxes for five years.

It is respectfully submitted that the facts do not justify such stringent rulings, and that cases cited like *Thomas vs. Railroad Co.*, 101 U. S. 71, which involved the violation of a positive penal statute, are not applicable to the case at Bar.

The Honorable Circuit Court of Appeals in passing upon the demurrers, did not have proof of the values involved before it. The Bills alleged that full value had been paid for the commutation. The presumption would be the same, and no claim of lack of consideration, unfairness or injustice in these matters is set up by the City. The long performance and satisfaction with the contracts also shows these facts.

The answer makes no disclosure of any values the City had received, except \$7,500.00. It merely denies in effect that it had to do any equity or make restitution. It does say that the value to it of the right to tax the railroad's property is the sum of \$20,000,—which at 5% interest would make \$1,000.00 per year,—the equivalent of the claimed tax. On the other hand, if the City received wharfage and lands worth \$200,000, then it had ten times the value it had given. The income from wharfage fees alone probably amounted to much in excess of the taxes. The City nowhere claims that receipts or other values did not fully offset taxes. Surely, relative values have some bearing on the issues here.

The majority opinion says (pp. 170-71), "If the Northwestern Virginia Railroad Company had continued business and continued to own the Railroad property in Parkersburg, and were plaintiff here, it could set up in

this Equity suit that it was entitled to a return of the property known as the Jackson lots, and the value of its use, if that could be made without detriment to the City, or to payment of the value of the property to the City and interest." And the Northwestern Company would be required to account for what it had received with interest.

But the Court says, that the City had performed the invalid tax covenant with the Northwestern Co., and no right or equity passed to the purchaser.

The dissenting opinion well says (R., p. 189): "What is proposed to be done in this cause, strikes at the very heart of the transaction, viz: that the long standing agreement between the parties shall be annulled; the Railroad Company required to pay full taxes, and the City to have the benefit of the contract between them and to keep and retain all of the property and estate and money received by it under the avoided contract."

If the deed in 1855 between the Northwestern Company and the City was invalid because *ultra vires*, there were equities there to be adjusted. The Railroad Company was then entitled to the lands and there would have been an accounting for rents, wharfage fees, and taxes. These lands would have gone to the purchaser at the foreclosure sale as after-acquired property of the Northwestern Company.

But the purchaser and the City acting in good faith, and clearly regarding the tax covenant as a continuing obligation for which the City received the full equivalent value, entered into the agreements confirming and continuing all prior contracts. We have already considered this feature under proposition II. above.

The City's title was confirmed against any attack by

the Company. It continued in the enjoyment of the property and income, and the Railroad Company's taxes were commuted.

On this record, it is certainly clear that it was never intended or contemplated by either party that the Railroad Company under these ordinances was "stripped" of the tax covenant.

If any of these agreements were invalid, because ultra vires then the property rights in equity were preserved to the respective parties.

All rights passed by these agreements, and under the authorities cited under proposition III.

In *Chapman vs. Douglass*, 107 U. S. 348, p. 360, the right of the original grantor of property sought to be reclaimed, passed by an assignment of the void securities.

So also in *Parkersburg vs. Brown* 106 U. S. 488.

The right to equities here ought not to be extinguished merely because of a claim of ultra vires.

In such cases, this Honorable Court has repeatedly decided that a city cannot repudiate as unauthorized, contracts under which it has received property, unless it surrenders the same.

In *Chapman v. County of Douglas*, 107 U. S. 348; involving a contract for the purchase of real estate, the court held it was ultra vires and void; but the city was required to make a restitution of the property; the Supreme Court at page 355 saying: "As the agreement between the parties has failed by reason of the legal disability of the county to perform its part according to its conditions, the right of the vendor to rescind the contract

and to a restitution of his title, would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *March vs. Fulton County*, 10 Wall. 676, and repeated in *Louisiana vs. Wood*, 102 U. S. 294, 'the obligation to do justice rests upon all persons natural and artificial, and if a county obtains the money or property of others without authority, the law independent of any statute, will compel restitution or compensation.' "

In this same case, the Supreme Court further considering the right of a corporation to escape liability from its contracts by reason of its own ultra vires acts, at page 357 quotes approvingly from *Pimental v. City of San Francisco*, 21 Cal. 362, the following language: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligations rest upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtains other property which does not belong to her, it is her duty to restore it, or if used to render an equivalent therefor, from the like obligation. *Argentini v. San Francisco*, 16 Cal. 282. The legal liability springs from the moral duty to make restitution."

In *Hitchcock vs. Galveston*, 96 U. S. 341, substantially the same language is used. "It matters not if the promise was to pay in a manner not authorized by law. If payment cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment should not be made at all."

In *Pullman Car Co. vs. Transportation Co.*, 171 U. S. 138, the Court held, the contract in that case was entirely illegal and void, and contrary to positive law. The court

required an accounting on the ground of "the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, which in justice he ought to recover. In *Stearns vs. Minnesota*, 179 U. S. 223, at pages 261-262, Mr. Justice White concurring, expresses similar views.

In *Louisville Water Co. vs. Clark*, 143 U. S. 1, 15, and 16, the city was required to pay for water when a tax exemption was destroyed.

In *Ortega Co. vs. Triary, Receiver*, 260 U. S. 103, the Court held, that a covenant for a five cent fare was the principal consideration for a contract; but that the Public Service Commission had power to increase the fare to seven cents. The Court, however, in concluding, says: "While this denies the relief, the Ortega Co. prays, we do not wish to be understood as adjudging that the Company may not be entitled to some remedy for the non-observance of the contract by the Traction Company. See *Louisville & N. R. R. Co. vs. Crow*, 156 Ky. 27; 49 L. R. A. (N. S.) 248."

In that Kentucky case, the plaintiff was allowed to recover the value of land received by a Railroad Company under an invalid agreement for passes.

In *Ward vs. Love County*, 253 U. S. 752, this court has approved the principles announced in *Chapman vs. County of Douglas*, 107 U. S. 348, and similar cases.

In *Whitaker vs. City of Huntington*, 88 W. Va. 422, the Supreme Court of West Virginia strongly approves the views of this court, and says "manifestly the corporation is as much bound by ordinary rules of honesty, and by the terms of a valid contract, as any other contracting party. Even if it be conceded for the sake of argument,

but not decided, that a city cannot be required to perform what it has promised to do in the manner and to the extent promised; yet it seems clear on reason and principle that it cannot keep what it has lawfully obtained, without restitution."

Relief in equity has frequently been denied to those seeking rescission or cancellation of contracts, where it is difficult to restore the status quo, or where it is impossible to do so, and where to award relief would "defeat the ends of justice or work a legal wrong."

Railway Co. vs. McCarthy, 96 U. S. 258.

Grymes vs. Sanders, 93 U. S. 55.

Gay vs. Alter, 102 U. S. 79.

Snow vs. Alley, 144 Mass. 546.

Worthington vs. Collins, 39 W. Va. 406.

Washington Seminary vs. Washington, 18 Pa. Superior 555.

Walker vs. Richmond (Ky.) 189 S. W. 1182.

The City has claimed that it is impossible now to restore the status quo. If so, it should be held to the performance of its covenants. It may be that there would be serious difficulty in making an accounting for wharfage fees, rents and interest, and in arriving at taxes on property never assessed. But if the City should for any reason be permitted to avoid its promise and covenants, it can turn over the lands and money it received from the Railroad Company in commutation of taxes. The Brief filed on behalf of the City in opposition to the petition for certiorari in this case, says at page 7, that "the status quo cannot be restored."

At page 9, there is an admission that there is an injustice done the Railroad Company on the question of

equities. "There is a larger question presented in this controversy than *strict, literal justice* to the Baltimore and Ohio Railroad Company. The motives that prompt the agents of the City to attempt to avoid a situation that is fast becoming intolerable, are derived from a sense of justice to twenty-five thousand people and many millions of dollars of property within the limits of the City." It might be added that this population and taxable wealth are due directly to the foresight of the early city fathers in fostering and encouraging the only railroad the City has.

Again, at page 9, it is said, "*The light of the times which prevailed in 1855 is not illuminating today, and the demands of public policy do not always result in dealing out old-fashioned justice to the individual.*"

We respectfully refer to the decisions of this honorable court already cited, which hold that contracts must be construed in the light of the times when they are made, and the acts of the parties thereunder, and that "the claims even of a state appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances." Justice does not become "old-fashioned" and go out of vogue in courts of equity, no matter who may pray for exemption therefrom.

We respectfully submit that for the reasons stated, the decree of the Circuit Court of Appeals should be reviewed and reversed.

Respectfully submitted,
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End

